



**ENDING & DEFENDING AGAINST HIV CRIMINALIZATION
A MANUAL FOR ADVOCATES:**

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STATE AND FEDERAL LAWS AND PROSECUTIONS

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With additional laws and cases through December 2011

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MISSION STATEMENT

The Center for HIV Law and Policy is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV.

We support and increase the advocacy power and HIV expertise of attorneys, community members and service providers, and advance policy initiatives that are grounded in and uphold social justice, science, and the public health.

We do this by providing high-quality legal and policy materials through an accessible web-based resource bank; cultivating interdisciplinary support networks of experts, activists, and professionals; and coordinating a strategic leadership hub to track and advance advocacy on critical HIV legal, health, and human rights issues.

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FOREWORD TO VOLUME I

This volume represents the first installment of a multi-volume resource for responding to the phenomenon of HIV criminalization. Future volumes and editions will include resources such as check lists for attorneys and other advocates, sample affidavits and other documents for cases that go to court, and additional analysis of the history and purpose of criminal and civil law punishments targeting people affected by HIV.

Because statutory law and common law trends develop and can change over time, we anticipate future editions of this volume to reflect such changes. However, while we made every attempt to include relevant cases as they existed at the time of publication, it is important to keep in mind that it is possible that we are significantly under-reporting the occurrence of HIV-related arrests and prosecutions in the United States. States do not share the same systems for tracking arrests across all counties and areas of the state, and many arrests are unlikely to appear in news reports or databases readily available to the general public or researchers.



A NEW STRATEGY TO END CIVIL AND CRIMINAL PUNISHMENT AND DISCRIMINATION ON THE BASIS OF HIV INFECTION

From the beginning of the HIV/AIDS epidemic, stigma and fear have fueled mistreatment of people living with HIV. One of the more troubling and persistent issues for people with HIV has been the prospect of criminal prosecution for acts of consensual sex and for conduct, such as spitting or biting, that poses no significant risk of HIV transmission. The Positive Justice Project is CHLP's response to this issue: a truly community-driven, multidisciplinary collaboration to end government reliance on an individual's positive HIV test result as proof of intent to harm, and the basis for irrationally severe treatment in the criminal justice system.

The use of criminal law as a way to stop or slow HIV transmission invariably is ineffective. The reasons why individuals take risks with their health, and how they assess risk, are many and complex. Arresting and prosecuting people with HIV for consensual sexual relationships or no-risk conduct, such as spitting, does nothing to take these reasons into account, or to assess risks based on the specific circumstances of the case at hand, such as viral load or even basic issues of intent or mutual responsibility.

We believe that success in reducing and ending reliance on criminal laws to single out and stigmatize people with HIV; educating court, prosecutors, and media; and in lessening stigma and discrimination, begins with a focus on the very real and serious public health ramifications of HIV criminalization. This in no way involves abandonment of civil liberties principles, but rather broadens the focus of advocacy to the public health consequences of ignoring individual rights.

A multi-pronged and collaborative plan is needed to address HIV criminalization, including a focused cross-disciplinary conversation about reconsidering the way we conceptualize and talk about HIV and transmission risk. Goals of our Positive Justice Project campaign include:

- Broader public understanding of the stigmatizing impact and negative public health consequences of criminalization and other forms of discrimination against people with HIV that occur under the guise of addressing HIV transmission.
- Community consensus on the appropriate use of criminal and civil law in the context of the HIV epidemic.
- Clear statements from lead government officials on the causes and relative risks of HIV transmission and the dangers of a criminal enforcement response to HIV exposure and the epidemic.
- A broader, more effective community-level response to the ongoing problem of HIV-related arrests and prosecutions.
- Reduction and eventual elimination of the inappropriate use of criminal and civil punishments against people with HIV.

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INTRODUCTION

This volume sets out the specific laws and illustrative cases in each state and U.S. territory on the treatment of people with HIV in the criminal justice system. Also included is a summary of military prosecutions of individuals with HIV, and the treatment of HIV as an aggravating factor under federal sentencing guidelines.

First, this volume and the individual state analyses it contains were carefully researched and current as of the date of publication. The law is fluid, however, and users always should check for the subsequent legal or legislative developments. The statutes and cases collected here are fairly comprehensive and will provide the reader with a good sense of how individuals living with HIV have fared under the criminal laws and enforcement policies in their states. The cases were identified through searches of press archives, internet searches, and case and news reports on Westlaw. In our search on Westlaw, we used successive search terms in various databases with HIV and either criminal charges and/or modes of transmission, such as “HIV,” “assault,” “spit,” etc., to identify court decisions and media reports. Although we have attempted to include all reported cases from either news media sources or official judicial opinions, not all cases of HIV exposure are reported in the media and many prosecutions do not result in published judicial opinions. As a result, the cases represented here are assumed not to constitute an exhaustive representation of all HIV-related prosecutions in the U.S. The cases presented are likely only a sampling of a much more widespread but generally undocumented use of criminal laws against people with HIV.

Second, this volume attempts to collect only those laws and state cases that explicitly, or by clear implication, have or can be used to prosecute people for conduct on the basis of HIV status. In some states, this has included general criminal laws that are not HIV-specific, including offenses such as:

- Reckless endangerment;¹
- Assault;²
- Terroristic threats;³ and
- Homicide and attempted homicide.⁴

¹ Typically, *reckless endangerment* is defined as recklessly engaging in conduct which places or may place another person in danger of death or serious bodily injury. Model Penal Code § 211.2 (1985). *Recklessness* is defined as a conscious disregard of a substantial and unjustifiable risk. § 2.02(2)(c). Consent is not a defense to reckless endangerment because, under the Model Penal Code, consent can only be a defense when the threatened harm is “not serious.” § 2.11(2)(a).

² Typically, *simple assault* is defined as an attempt to cause, or purposely, knowingly, or recklessly causing bodily injury to another. Model Penal Code § 211.1(1) (1985). The crime also includes negligently causing bodily injury to another with a deadly weapon. The crime becomes an *aggravated assault* if the actor causes or attempts to cause “serious” bodily injury, or if he or she knowingly or purposely causes or attempts to cause bodily injury with a deadly weapon. § 211.1(2).

³ Typically, *terroristic threat* is a communication, either directly or indirectly, of a threat to commit any crime of violence with intent to terrorize another or otherwise cause terror with reckless disregard of the risk of causing such terror. *See Commonwealth v. Walker*, 836 A.2d 999 (Pa. Super. Ct. 2003) (affirming conviction on basis that defendant’s statements were intended to cause terror from fear of HIV infection, likelihood of actual HIV infection resulting from threatened conduct is immaterial).

⁴ Typically, *homicide* can either be *murder* (a homicide committed purposely, knowingly, or with extreme recklessness), Model Penal Code § 210.2 (1985), *manslaughter* (a reckless homicide), § 210.3, or *negligent homicide* (a homicide committed negligently), § 210.4. *See also* § 2.02 (general requirements of culpability: definitions of “purposely,” “knowingly,” “recklessly,” “negligently”). Homicide offenses relating to HIV transmission are rarely prosecuted, except as attempted offenses, because it is unusual for transmission of HIV to result in death. Homicide prosecutions are also unusual because of the requirement of proof of causation and proof of intent to transmit HIV, particularly in sexual contact cases. *aff’d State v. Schmidt*, 771 So. 2d 131 (La. Ct. App. 2000) (affirming conviction and sentence of 50 years at hard

Although these general criminal laws could, theoretically, be used against people living with HIV in all states, we only include case reports about them where they in fact have been applied to cases involving HIV.

This volume does not include analysis of the many state laws that mandate HIV testing of suspects arrested and/or convicted of sex offenses, some with negative consequences for those who test positive. We also do not address the very real, increasing problem of confidentiality violations, in which public health, health care, and other service providers share the HIV status of individuals in their care with law enforcement officials, sometimes after counseling them to avoid sexual contact without prior partner notification, in the belief that these individuals pose a risk to others and that health and service providers have a legal or ethical “duty to warn.”

Many states have “communicable” or “contagious disease” control statutes that criminalize STI exposure, which may or may not include HIV.⁵ Most of these statutes were enacted prior to the discovery of HIV and have typically not been enforced against any person with an STI or HIV. The penalties under these statutes tend to be limited to misdemeanors and there is no record of a case of HIV exposure ever being prosecuted under such statutes. Due to the antiquated nature and limited use of these statutes, such communicable disease statutes were not highlighted in this manual except in cases where HIV is noted within the scope of the statute. For states that have an HIV-specific criminal statute in addition to a communicable disease control statute (i.e.: California, Tennessee, etc.), the latter was not highlighted or analyzed.

The state-by-state section references but does not include an exhaustive analysis of all instances of sentencing determinations that, even without HIV-specific sentencing statutes, were or could be influenced by a defendant’s HIV status, or a victim’s allegation that the impact of a crime included fear of exposure to HIV. Such cases typically concern rape survivors who, after learning of a defendant’s HIV-positive status, or other infection with an STI, may have begun to take preventative medication, or feared possible infection with HIV, or have become alienated from family members. These factors can be material to a sentencing court’s consideration of the “impact of the crime upon the victim ... including a description of the nature and extent of any physical, psychological, or financial harm.” In these cases, courts and juries might treat the “physical and emotional trauma” as constituting a level of harm beyond that of a “typical” rape victim.⁶

An additional area of law that is not addressed here in depth, but is of potential concern to people with HIV and their advocates, is the option of civil commitment available to government officials seeking to isolate individuals with HIV, or to continue to confine persons with HIV whose conviction can be characterized as a sex crime. There are two types of these laws of concern to people with HIV and their advocates. The first are general civil commitment laws, available to

labor in attempted homicide prosecution based on defendant’s having intentionally injected victim with HIV), *prior opinion*, 699 So. 2d 448 (La. Ct. App. 1997) (pre-trial writ opinion ruling on admissibility of DNA evidence).

⁵ See e.g., CAL. HEALTH & SAFETY CODE § 120600 (West 2010); LA. REV. STAT. ANN. § 40:1062 (2008); MONT. CODE ANN. § 50-18-112 (1989); N.Y. PUB. HEALTH LAW § 2307 (McKinney 2001); S.C. CODE ANN. § 44-29-60 (2009); TENN. CODE ANN. § 68-10-107 (2010); VT. STAT. ANN. TIT. 18 § 1106 (1973); W. VA. CODE § 16-4-20 (2010). There has never been a prosecution for HIV exposure under any of these statutes. Prosecutions for HIV exposure, if any, have arisen out of the general criminal law or HIV-specific exposure statutes of these states.

⁶ See e.g., *Torrence v. Commonwealth*, 269 S.W.3d 842, 845-46 (Ky. 2008); *State v. Scott*, 180 P.3d 774 (Utah Ct. App. 2008).

health and law enforcement officials in every state, that allow for the involuntary commitment, typically to a mental health or medical facility, of individuals determined to be a danger to the public or to themselves. Under this type of law, an individual who comes to the attention of a public health officer who believes the individual is behaving in a way that threatens disease transmission can be subjected to a petition and court order confining the individual for a period of time until the supposed risk of harm no longer exists. The other type of law authorizes the confinement of individuals determined to be sexually violent predators, i.e. persons who have been convicted of or charged with a sexually violent offense and who suffer from a condition affecting emotional or volitional capacity such that they pose a menace to the health and safety of others.

The United State Supreme Court has upheld the use of involuntary civil commitment or confinement of individuals, although the use of this measure has certain requirements to remain within the bounds of the federal Constitution.⁷ Such measures have been used against persons with HIV in recent cases suggesting that a defendant's history of unprotected sexual contact (as admitted by a defendant or evidenced by his contracting a sexually transmitted infection such as gonorrhea or syphilis) without disclosure of his HIV infection is adequate to meet the statutory dangerousness standard for confinement.⁸ A more recent, and perhaps more pernicious trend, is the indefinite detention of persons with HIV under sexually violent predator confinement statutes. Such statutes were upheld by the Supreme Court in *Kansas v. Hendricks*⁹ and have been applied to persons with HIV based on sexual activity posing no risk of HIV transmission.¹⁰

In virtually every state and case situation, state and local prosecutors possess significant discretion in determining whether and how to prosecute individuals arrested or reported for HIV exposure. It is important to keep in mind that particular jurisdictions with significant numbers of prosecutions may be as reflective of a prosecutor's mindset or ambitions as it is a product of a particular state law. However, it is difficult to include assessment of this factor in a publication of this kind. Obviously, we cannot report on cases that prosecutors have declined to prosecute, and, to our knowledge, no prosecutor has developed public guidelines for use in determining whether prosecution is appropriate or not (some prosecutors might, as some cases suggest, select only cases in which there are multiple partners involved in sexual activities that present at least an actual risk of transmission, where the defendant has been explicitly warned that his behavior if continued will result in prosecution, where actual transmission of HIV seems to have taken place, or where a defendant has evidenced an intent to transmit HIV – cases that from a law enforcement point of view present more egregious circumstances and greater ease of conviction).

Similarly, the overly broad statutes that criminalize, as we point out in our analysis, conduct that presents little or no risk of HIV transmission, might be narrowed in their application by appropriate prosecutorial discretion. But even if a prosecutor declines to prosecute a specific case, being the subject of a law enforcement investigation of HIV exposure can have significant negative impact on

⁷ See *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979). For a discussion of civil detention of individuals with HIV who pose a risk of transmission, see Ronald Bayer & Amy Fairchild-Carrino, *AIDS and the Limits of Control: Public Health Orders, Quarantine, and Recalcitrant Behavior*, 83 Am. J. Pub. Health 1471 (1993) (finding very limited use of civil detention measures and advocating instead for education, counseling, voluntary testing and partner notification, drug abuse treatment, and needle exchange programs to prevent HIV transmission).

⁸ *In re Renz*, No. A08-898, 2008 WL 4706962 (Minn. Ct. App. Oct. 28, 2008).

⁹ 521 U.S. 346 (1997).

¹⁰ *In re Coffel*, 117 S.W.3d 116 (Mo. Ct. App. 2003) (reversing civil confinement order after three years of confinement as a sexually violent predator based on underlying criminal offense posing no risk of HIV transmission).

the life of someone with HIV. The statutes we analyze thus present a significant risk of harm to persons with HIV who in fact may not have engaged in behavior that is a prosecutable offense.

Our analysis is not able to capture fully whether defendants with HIV are given fair trials or whether, because of the social stigma that attaches to their status as HIV-positive in what are often emotionally charged allegations of betrayal within deeply intimate relationships, their own truthful testimony is discounted, or their defense counsel are less than zealous and well-informed about the underlying medical and scientific issues.¹¹

Defendants in such cases also may not have adequate access to expert scientific witnesses. Indeed, some convictions of persons with HIV appear to be the result of so-called expert testimony that is nothing more than “junk science” that unfortunately is relied upon by judges or juries, even in those cases where the defense seeks to challenge and discredit it. Nevertheless, given many of the “facts” as found by judges or juries in these cases, there is certainly support for the view that the testimony of defendants with HIV is often discounted, particularly in cases where conflicting testimony is from law enforcement personnel who are likely to be viewed sympathetically by the fact-finder and whose social standing is superior to that of the defendant,¹² such as those testifying that they were spit upon or bitten by an HIV-positive defendant in their custody, or for the “morally innocent” sexual partners whose trust has allegedly been betrayed by the nondisclosure of HIV status by a sexual partner.¹³

In our summaries of cases, which include both reports of cases in published judicial opinions as well as in news media sources, we include as many relevant facts about the defendant and the case as possible, but without making any judgment about how one might interpret those facts.¹⁴ For example, in many cases, information about the HIV status of the defendant’s sexual contact or contacts is included. As we explain, proof of transmission to a sexual partner is generally not an element in most cases. Often, however, while it is either implied or explicitly stated that the defendant is the source of a sexual partner’s HIV infection, there is often little if any information about how the defendant, as opposed to another sexual partner, has been established as the source of that infection.

Finally, under many HIV-specific statutes, particularly those imposing enhanced penalties for prostitution offenses, cases can be prosecuted under attempt or solicitation theories, and no evidence of a completed offense is necessary for conviction. Under these often overly broad statutes, as we note, no sexual contact or other activity posing a risk of HIV transmission is

¹¹ See, e.g., *State v. Bird*, 692 N.E.2d 1013 (Ohio 1998) (affirming conviction based on defendant’s no contest plea which was deemed an admission of factual issue as to whether saliva can be a deadly weapon because of risk of HIV transmission).

¹² See, e.g., *People v. Hall*, 124 Cal. Rptr. 2d 806 (Cal. Ct. App. 2002) (affirming HIV testing order on theory that sweat on defendant’s hands might pose a risk of HIV transmission to prosecutor who defendant assaulted during his criminal trial).

¹³ See, e.g., *Ginn v. State*, 667 S.E.2d 712 (Ga. Ct. App. 2008) (affirming conviction in case that resulted from the defendant’s former sexual partner applying for an arrest warrant with magistrate court and giving a statement to sheriff’s department against the defendant for failing to inform him of her HIV status, although her HIV status was published on the front page of a local newspaper before she commenced the sexual relationship).

¹⁴ In regard to news media reports, we caution the reader that the actual facts may differ significantly from those as reported, given the potential for sensationalized reporting on such cases. Nevertheless, we include these news reports because in many cases there is no other published source of information about the case.

necessary, and often court opinions offer scant information about the actual risk of HIV transmission that would have resulted from the offense, had it been completed.

STATE BY STATE GUIDE

Alabama Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**ALA. CODE § 22-11A-21(C)*****Penalties for person afflicted with sexually transmitted disease for transmitting such disease to another person***

Any person afflicted with an STD who knowingly transmits, assumes the risk of transmitting, or does any act which will probably or likely transmit such disease to another person is guilty of a Class C misdemeanor.

HIV included among STDs, *see* ALA. ADMIN. CODE r. 420-4-1-.03(2008).

Class C misdemeanors are punishable by up to three months in jail.

Alabama has prosecuted incidents of HIV exposure under general criminal laws.

Under Alabama's communicable disease exposure statute, HIV-positive persons may be imprisoned for up to three months or fined up to \$500 if they "knowingly" transmit the virus to another.¹⁵ Neither the intent to transmit HIV nor actual transmission is required.

Though HIV/AIDS is classified as a sexually transmitted disease for the purpose of Alabama's statute there has never been a prosecution for HIV exposure under this law. Many states¹⁶ have similar communicable disease control statutes, but their applicability to HIV is doubtful as many were enacted prior to the HIV epidemic and there have been no prosecutions for HIV exposure under such statutes. In the absence of specific HIV exposure laws, states have prosecuted incidents of HIV exposure under general criminal laws, including assault and reckless endangerment.

In *Brock v. State*,¹⁷ an HIV-positive inmate who was in the AIDS unit of an Alabama prison was charged with attempted murder and two counts of assault when he allegedly became belligerent and bit a police officer. The police officer did not test positive for HIV. At trial, the jury acquitted Brock of the attempted murder charge but convicted him of first-degree assault, a crime which required that the defendant both intend to cause and actually cause "serious physical injury" with "deadly weapon or dangerous instrument."¹⁸ The prosecution argued that because the defendant was HIV-

¹⁵ ALA. ADMIN. CODE r. 420-4-1-.03(2008). Alabama law defines a person as acting "knowingly" when "he is aware that his conduct is of that nature of that the circumstance existed." ALA. CODE § 13A-2-2(1975).

¹⁶ Other state statutes have criminal exposure statutes for "sexually transmitted diseases," "infectious venereal diseases," etc. *See e.g.* CAL. HEALTH & SAFETY CODE § 120600 (West 2010); LA. REV. STAT. ANN. § 40:1062 (2008); MONT. CODE ANN. § 50-18-112 (1989); N.Y. PUB. HEALTH LAW § 2307 (McKinney 2001); S.C. CODE ANN. § 44-29-60 (2009); TENN. CODE ANN. § 68-10-107 (2010); VT. STAT. ANN. TIT. 18 § 1106 (1973); W. VA. CODE § 16-4-20 (2010). There has never been a prosecution for HIV exposure under any of these statutes. Prosecutions for HIV exposure, if any, have arisen out of the general criminal law or HIV-specific exposure statutes of these states.

¹⁷ 555 So. 2d 285 (Ala. Crim. App. 1989).

¹⁸ ALA. CODE § 13A-6-20 (1987).

positive, his mouth and teeth were “highly capable of causing death or serious physical injury” and should be considered dangerous weapons or instruments for the purposes of the assault charges.

On appeal, Alabama’s Court of Criminal Appeals dismissed the first-degree assault conviction and downgraded his conviction to assault in the third degree. The court held that the state failed to establish the essential elements of a case of first-degree assault against Brock. The court stated that no evidence was provided that Brock’s mouth and teeth were “deadly weapon[s]” as defined by Alabama statute. Moreover, the state did not prove that Brock intended to cause serious physical harm to the prison guard. The court noted that the state provided no evidence that AIDS can be transmitted through a human bite, and that the court did not believe it to be an established scientific fact that AIDS could be transmitted in such a manner.

The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors, including “severe trauma, extensive tissue damage, and the presence of blood.”¹⁹ The CDC has also maintained that saliva alone has never been shown to transmit HIV.²⁰ Despite these findings, there have still been prosecutions for HIV exposure for biting or spitting. (*See Texas*).

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

¹⁹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?* (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

²⁰ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted by being spit on by an HIV-infected person?* (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

Alaska Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**ALASKA STAT. § 12.55.155(C)(33)*****Sentence Enhancement for HIV Exposure***

The sentencing court may impose a sentence above the presumptive range if the offense was a felony sexual offense specified in ALASKA STAT. §§ 11.41.410-11.41.455 and the following factors are proven in accordance with this section: the defendant had been previously diagnosed as having or having tested positive for HIV, and the offense either (A) involved penetration, or (B) exposed the victim to a risk or a fear that the offense could result in the transmission of HIV.

HIV-positive status may lead to higher prison sentences for felony sexual offenses.

Alaska has no statute explicitly criminalizing HIV transmission or exposure, but enhanced sentencing may be applicable based on a defendant's HIV status if she/he is found guilty of one of the specified sex offenses. If an HIV-positive person is found guilty of a sexually-based assault, she/he may receive an enhanced term of imprisonment if (1) the offense involved penetration or (2) the defendant exposed the victim to a risk or fear that HIV transmission could result. Neither the intent to transmit HIV nor actual transmission is required.

Alaska defines “sexual penetration” to include all intrusions “however slight, of an object or any part of a person’s body into the genital or anal opening of another person’s body.”²¹ An enhanced sentence can be imposed regardless of the defendant’s viral load; whether protection, such as a condom, was used; or if the crime involved penetration with a body part or object that cannot transmit HIV.

In 1996, a man’s HIV-positive status was considered an “aggravating factor,” and he was sentenced to ten years for sexual abuse of a minor.²² On appeal, the court affirmed the lower court’s sentencing because the defendant knew he had HIV at the time of the sexual conduct with the minor, didn’t disclose his status, and didn’t take any measures to protect her from HIV. The court found that even though the minor provided a condom that was used for the second sexual encounter, and the minor had thus far tested negative for HIV, it was “safe to infer that [the minor] will be very fearful for some time to come” that she may test positive for HIV. The court determined that such considerations supported an enhanced sentence.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

²¹ ALASKA STAT. § 11.81.900(59)(A) (2006).

²² Wans v. State, No. A-6188, 1996 WL 671355 at * 1 (Alaska Ct. App. 1996).

Arizona Statute(s) that Allow for Criminal Prosecution Based on HIV Status:

No specific statute on record.

There are no explicit statutes regarding HIV or STI exposure.

There are no statutes explicitly criminalizing HIV transmission or exposure in Arizona. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault.

At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Arizona.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice

Arkansas Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**ARK. CODE ANN. § 5-14-123*****Knowingly “Transmitting” AIDS, HIV***

It is a Class A felony for a person who knows that she/he has tested positive for HIV to expose another to HIV (1) through the parenteral transfer of blood or blood products or (2) by engaging in sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, without first having informed the other person of the presence of HIV. The emission of semen is not required.

ARK. CODE ANN. § 20-15-903***Receiving Health Care***

A person who is HIV-positive must, prior to receiving any health care services of a physician or dentist, advise such physician or dentist that the person has HIV. Failure to do so is a Class A misdemeanor.

ARK. CODE ANN. § 5-4-401***Sentence***

For a Class A felony, the sentence shall not be less than six years but not more than thirty years.

For a Class A misdemeanor, the sentence shall not exceed one year.

ARK. CODE ANN. § 5-4-201***Fines – Limitation on Amount***

A defendant convicted of a felony may be ordered to pay a fine not exceeding \$15,000 if the conviction is of a Class A or Class B felony.

A defendant convicted of a misdemeanor may be sentenced to pay a fine not exceeding \$2,500 if the conviction is of a Class A misdemeanor.

To avoid the risk of arrest and prosecution, HIV status must be disclosed to partners before engaging in sexual activities.

People living with HIV in Arkansas should be aware that penalties for engaging in a broad range of sexual activities, without first notifying partners of one's HIV status, can result in criminal penalties. If a person in Arkansas is aware that she/he is HIV-positive, she/he must disclose this to a sexual partner before engaging in penile-vaginal sex, anal sex, oral sex, or the insertion of any body part of an HIV-positive person into the genital or anal openings of another person.²³ Though the statute's title emphasizes "transmitting AIDS/HIV," neither the intent to transmit HIV, actual transmission of HIV, or the ejaculation of semen are required for prosecution.

The only affirmative defense to prosecution is the disclosure of one's HIV status. However, it is difficult to prove whether HIV status was disclosed in the course of private sexual activities because the evidence in these matters is often, if not always, limited to "he said, she said" testimony by the parties or third-party witnesses. In *State v. Weaver*, for example, an HIV-positive man was sentenced to a thirty-year imprisonment for allegedly having sex without disclosing his status, even though he maintained at trial that he did disclose his status to his partner.²⁴ To rebut the defendant's testimony, the prosecution called a health official to testify that the defendant said he would infect anyone he could if he was HIV-positive. On appeal, the court found that the rebuttal testimony was sufficient as it went to the intent of the defendant to expose others to HIV, and therefore to the fact that the defendant probably did not tell the complainant that he was HIV-positive.²⁵

Prosecutions of HIV exposure cases raise serious issues as to the confidentiality of medical records and patient history. In criminalization matters, states often authorize the disclosure of otherwise confidential HIV information. Disclosure of this information does not require the defendant's authorization even though it is her/his confidential medical information that is being disseminated to third parties. In a second trial to prosecute the same defendant from *Weaver* on two additional counts of exposing another to HIV, the state obtained the defendant's medical records from the county health department by issuing an investigative subpoena, which did not require court approval.²⁶ The defendant was convicted of those remaining counts and sentenced to thirty years for each count, to be served concurrently with his prior conviction. On appeal, the defendant argued that the medical records were obtained in violation of the state's rule of criminal procedure, rules of evidence, as well as the state and federal constitutions. The Arkansas Court of Appeals found that the prosecutor's use of the investigative subpoena was proper because prosecutors are statutorily allowed to subpoena medical records without court approval if it is for the investigation of a crime.²⁷

²³ ARK. CODE ANN. § 5-14-123 (West 2010).

²⁴ 939 S.W.2d 316, 318 (Ark. Ct. App. 1997).

²⁵ *Id.* at 319.

²⁶ *Weaver v. State*, 990 S.W.2d 572 (Ark. Ct. App. 1999).

²⁷ *Id.* at 574-75, (citing ARK. CODE ANN. § 20-15-904(c)) ("(a) [A] person with Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies is infectious to others through the exchange of body fluids during sexual intercourse and through the parenteral transfer of blood or blood products and under these circumstances is a danger to the public. (b) A physician whose patient is determined to have Acquired Immunodeficiency Syndrome (AIDS) or who tests positive for the presence of Human Immunodeficiency Virus (HIV) antigen or antibodies shall immediately make a report to the Arkansas Department of Health in such manner and form as the department shall direct. (c)(1) All information and reports in connection with persons suffering from or suspected to be suffering from the diseases specified in this section shall be regarded as confidential by any and every person, body, or committee whose duty it is or may be to obtain, make, transmit, and

Arkansas also requires court-ordered involuntary HIV testing for complainant notification. All criminal defendants in Arkansas charged with sexual assault, incest, or prostitution may be required to submit to an HIV test and, upon conviction, and at the victim's request, will be required to take an HIV test.²⁸ At least thirty-three states have passed similar statutes permitting involuntary HIV testing of certain suspects, defendants, or convicts.²⁹

Sentences for violating Arkansas's HIV exposure statute are severe. The minimum sentence for the Class A felony is six years, but sentences and fines of up to thirty years and \$15,000 are possible.³⁰ Sex offender registration may also be required by a sentencing court,³¹ which often leads to community ostracism and serious problems finding employment. The following cases serve as illustrations of possible penalties for violating Arkansas' criminal exposure statute:

- An HIV-positive man was sentenced to twenty years imprisonment in March 2010 after engaging in unprotected sex with a woman without first disclosing his status.³²
- In May 2009, a 17-year-old high school student was arrested for failing to inform his teenage sexual partner of his HIV status before engaging in unprotected sex. He was charged as an adult and sentenced to fifteen years in jail after pleading guilty to five counts of exposing another person to HIV. Part of his sentence included mandatory sex offender registration.³³
- In May 2008, a 33-year-old, HIV-positive man was sentenced to twelve years in prison for failing to disclose his HIV status to his girlfriend and another woman prior to engaging in sexual conduct. The man also had to register as a sex offender. Neither of the women tested

receive such information and reports. (2) *However, any prosecuting attorney of this state may subpoena such information as may be necessary to enforce the provisions of this section and 5-14-123 and 16-82-101, provided that any information acquired pursuant to such subpoena shall not be disclosed except to the courts to enforce the provisions of this section.*" (Emphasis added)).

²⁸ ARK. CODE ANN. § 16-82-101(2003).

²⁹ ALA. CODE § 22-11A-17 (2010); ARIZ. REV. STAT. ANN. § 13-1415 (2010); CAL. PENAL CODE §§ 1202.1, 1202.6 (West 2004); CAL. HEALTH & SAFETY CODE §§ 121050, 121055 (West 2006); COLO. REV. STAT. §§ 18-3-415, 18-7-205.5 (West 2004); CONN. GEN. STAT. §§ 54-102a, 102b (2010); FLA. STAT. ANN. §§ 775.0877, 796.08 (West 2010); GA. CODE ANN. § 17-10-15 (West 2010); 730 ILL. COMP. STAT. ANN. § 5/5-5-3 (West 2010); IND. CODE ANN. § 35-38-1-10.5 (West 2010); KY. REV. STAT. ANN. §§ 510.320, 510.090 (West 2010); LA. REV. STAT. ANN. § 15:535 (2005); LA. CODE CRIM. PROC. ANN. art. 499 (2003); ME. REV. STAT. ANN. tit. 5, §§ 19203-A, 19203-F (2002); MICH. COMP. LAWS. ANN. § 333.5129 (West 2001); MISS. CODE ANN. §§ 99-19-201, 99-19-203, 43-21-623 (West 2010); MO. ANN. STAT. § 191.663 (West 2004); MONT. CODE ANN. § 46-18-256 (2010); NEB. REV. STAT. § 29-2290 (2010); NEV. REV. STAT. §§ 201.356, 441A.320 (2009); N.H. REV. STAT. ANN. §§ 632-A:10-b (2010); N.J. REV. STAT. §§ 2A:4A-43.1, 2C:43-2.2 (2005); N.M. STAT. ANN. § 24-2B-5.1 (2010); N.Y. CODE CRIM. PROC. § 390.15 (McKinney 2005); N.Y. FAM. CT. ACT § 347.1 (McKinney 2008); N.D. CENT. CODE § 23-07-07.5 (2010); OHIO REV. CODE ANN. § 2907.27 (West 2010); OKLA. STAT. ANN. tit. 63, §§ 1-524, 525 (West 2005); OR. REV. STAT. § 135.139 (2003); 35 PA. CONS. STAT. ANN. §§ 521.11a, 7608 (West 2003); TENN. CODE ANN. §§ 39-13-521, 68-10-116 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 21.31 (Vernon 2009); VA. CODE ANN. §§ 18.2-62, 18.2-346.1 (West 2010); WASH. REV. CODE ANN. §§ 70.24.330, 70.24.105 (West 2002); W. VA. CODE §§ 16-3C-2(f), 16-3C-3-5 (2010); WIS. STAT. §§ 252.15, 968.38 (2010).

³⁰ ARK. CODE ANN. § 5-4-401(a)(2) (West 2010); § 5-4-201(a)(1).

³¹ § 12-12-903 (12)(A)(i)(p).

³² Wanda Freeman, *HIV-positive Man Gets 20-year Term*, TIMES REC. ONLINE, Mar. 11, 2010, http://www.swtimes.com/news/article_65cead58-2a9f-51f9-b9be-3fd6c779af14.html.

³³ *Local Teen Charged with Spreading HIV Virus*, 4029TV.COM, May 19, 2009, <http://www.4029tv.com/news/19507766/detail.html>; Tracy Neal, *Grey Sentenced to 15 Years*, NWAONLINE.COM, Dec. 22, 2009, <http://www.nwaonline.com/news/2009/dec/22/gray-sentenced-15-years/>.

positive for HIV.³⁴

Exposing another to HIV-positive blood is criminally punishable.

Because the law punishes “parenteral” exposure—i.e., exposure through a break in the skin or through a mucus membrane—prosecutions are possible if any amount of HIV-positive blood makes contact with another individual’s non-intact skin, eyes, nose, mouth, or other area involving a mucus membrane. In May 2010, a 41-year old, HIV-positive man was charged with criminal exposure to HIV after allegedly spitting blood at a police officer.³⁵

HIV status must be disclosed before receiving medical treatment.

All people in Arkansas who are aware that they are HIV-positive must inform doctors or dentists of their HIV status before receiving treatment.³⁶ Failure to meet this requirement is punishable by up to one year in prison, a \$2,500 fine, or both.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

³⁴ Ron Wood, *Man Gets Prison Term for Exposing Woman to HIV*, MORNING NEWS, May 2, 2008, <http://criminalhivtransmission.blogspot.com/2008/05/33-year-old-arkansas-man-who-pleaded.html>.

³⁵ Gavin Lesnick, *HIV-positive Man Spits Blood at Police Officer, Report Says*, ARKANSASONLINE.COM, May 12, 2010, <http://www.arkansasonline.com/news/2010/may/12/hiv-positive-man-spits-blood-officer-report-says/?latest>.

³⁶ ARK. CODE ANN. § 20-15-903.

California Statute(s) that Allow for Criminal Prosecution Based on HIV Status:**CAL. HEALTH & SAFETY CODE § 120291*****Unprotected sexual activity by one who knows self to be infected by HIV***

Any person who exposes another to HIV by engaging in unprotected sexual activity (anal or vaginal intercourse without a condom) when the infected person knows at the time of the unprotected sex that she/he is infected with HIV, has not disclosed her/his HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by three, five, or eight years imprisonment. A person's knowledge of her/his HIV-positive status, without additional evidence, is not sufficient to prove specific intent.

CAL. HEALTH AND SAFETY CODE § 120290***Willful exposure of self or others to disease***

Except as provided in Section 120291 above, or in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who willfully exposes herself/himself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor.

CAL. PENAL CODE § 12022.85***Sentence enhancement for sexual offenses***

Any person who commits rape, unlawful intercourse with a female under the age of eighteen, spousal rape, sodomy, or oral copulation with the knowledge that she/he is infected with HIV at the time of commission, shall receive a three-year enhancement for each violation in addition to the sentence provided for the sexual offense itself.

CAL. HEALTH AND SAFETY CODE § 1621.5

Donation of blood, etc., by person know that he or she has HIV/AIDS

It is a felony punishable by imprisonment in the state prison for two, four, or six years, for any person who knows that she/he has HIV/AIDS to donate blood, body organs or other tissue, semen to any medical center or semen bank that receives semen for purposes of artificial insemination, or breast milk to any medical center or breast milk bank that receives breast milk for purposes of distribution, whether she/he is a paid or a volunteer donor. This measure does not apply to any person who (1) is mentally incompetent, (2) self-defers her/his blood (indicates that it should not be used for transfusion, but only for research purposes), or (3) donates her/his blood for purposes of an autologous donation—i.e., donates for use in another part of the donor's body.

CAL. PENAL CODE § 647F

Penalty enhancements concerning prostitution

If a defendant charged with prostitution or soliciting prostitution has been previously convicted one or more times of that misdemeanor crime, or of any other sexual offense, and in connection with one or more of those convictions a blood test for HIV was administered with positive test results, of which the defendant was informed, the defendant is guilty of a felony.

Punishment for violation of this statute can range from sixteen months to three years or imprisonment in the county jail not to exceed one year and/or a fine.
CAL. PENAL CODE § 18.

HIV-positive persons may be prosecuted for engaging in unprotected sexual intercourse with the specific intent to transmit HIV.

Under California's felony exposure statute, imprisonment for three, five, or eight years may follow if an HIV-positive person (1) engages in unprotected penile-vaginal sex or unprotected anal sex, (2) with knowledge of her/his positive status, (3) without disclosing HIV status to sexual partners, *and* (4) with the specific intent to transmit HIV.³⁷ No actual transmission of the virus is required.

Proof of disclosure of one's status and/or using condoms, or other protection, are affirmative defenses to prosecution. Importantly, an HIV-positive person will only be prosecuted if there is proof that the person *specifically intended* to transmit HIV to a partner. Knowledge of one's HIV

³⁷ CAL. HEALTH & SAFETY CODE § 120291 (West 2010).

status alone is insufficient for prosecution. In other jurisdictions intent has been shown through statements a defendant made about wanting to infect others with HIV.³⁸

In September 2010, a 41-year-old man pleaded guilty to having unprotected sexual activity while knowing he was HIV-positive and acting with the intent to infect his sexual partner.³⁹ This is the only case on record of anyone ever being charged or convicted under California's statute.

HIV-positive individuals may receive enhanced sentences or aggravated assault charges for sex crimes.

California imposes sentence enhancements for sex offenders who are HIV-positive. Specifically, if a person living with HIV/AIDS knows her/his status and commits a sex offense, or multiple sex offenses, an additional three years in prison are required for each offense.⁴⁰

No intent to transmit HIV or actual transmission is required.

The sentencing law may be applied regardless of the defendant's viral load, whether condoms or other protection were used, or whether HIV could have been transmitted during the acts in question.

Although cases arising under sentence enhancement laws are rare in California, in 1998 a man received a sentence enhancement of nine additional years in prison for having unprotected sex with a minor while being HIV-positive.⁴¹ On a challenge to the sentencing enhancement statute, the California Court of Appeal declined to label the application of the statute "cruel and unusual punishment" under the Eighth Amendment, as it did not punish HIV-positive status but punished conduct.⁴²

Sexual assault charges may also be elevated to aggravated assault charges if the HIV-positive defendant fails to use protection. In *Roman v. Superior Court*,⁴³ an HIV-positive man anally raped a minor without using a condom, and the court found that to be sufficient evidence that the defendant engaged in conduct "likely to produce great bodily harm or death," elevating his charge to aggravated assault from sexual assault. No actual finding of HIV transmission was required.

³⁸ See *State v. Stark*, 832 P.2d 109 (Wash. Ct. App. 1992)(finding that HIV-positive defendant's statement, "I don't care. If I'm going to die, everybody's going to die," when talking about his sexual activity, was sufficient to show intent to inflict bodily injury on his sexual partners through exposure to HIV); *Commonwealth v. Walker*, 836 A.2d 999 (Pa. Super. Ct. 1999)(an HIV-positive man was found guilty of communicating terrorist threats when he scratched a parole officer on the hand and said, "I have open cuts on my hands. Life is short. I am taking you with me." The court found that the statement was sufficient to show intent.

³⁹ Tomoya Shimura, *Gang Member Pleads Guilty to Spreading HIV*, HIGHDESERT.COM, Sept. 7, 2010, available at <http://www.highdesert.com/articles/spreading-21626-vvdailypress-gang-victorville.html>

⁴⁰ CAL. PENAL CODE § 12022.85 (West 2010).

⁴¹ *Guevara v. Superior Court*, 73 Cal. Rptr. 2d 421 (Cal. Ct. App. 1998).

⁴² *Id.* at 425; (distinguishing *Robinson v. California*, 370 U.S. 660 (1962) and finding a statute punishing the status of being addicted to drugs while in California void as cruel and unusual punishment).

⁴³ 5 Cal. Rptr. 3d 807 (Cal. Ct. App. 2003).

Heightened penalties may result from activities as a sex worker or soliciting sex while HIV-positive.⁴⁴

California prostitution laws provide for additional penalties when an HIV-positive individual is found guilty of either engaging in or soliciting prostitution. Under § 647F of the California Penal Code, if an individual is (1) found guilty of either soliciting or engaging in prostitution, (2) has previously been convicted of a sex offense, and (3) tested positive for HIV following a previous sex offense conviction, she/he is guilty of a felony and may be imprisoned for up to three years.⁴⁵

This sentencing law punishes a defendant for being HIV-positive regardless of whether she/he intended to transmit HIV, transmitted the virus, or engaged in activities likely or possible to do so. To commit a felony under this statute, no actual sexual activity is required. A conviction for prostitution is possible as long as a defendant does some act proving an intent and agreement to engage in prostitution.⁴⁶

In 2007, an HIV-positive sex worker was charged with exposing others to HIV and felony prostitution.⁴⁷ She had previously been convicted of prostitution and had tested positive for HIV.⁴⁸ The defendant had condoms in her possession and had not yet engaged in sex with an undercover officer. On appeal, the court upheld the felony prostitution charge but dismissed the exposure charge finding that there was not a specific intent to transmit HIV.

Individuals with HIV must not donate blood, organs and other tissues, semen, or breast milk, to others.⁴⁹

A person may face two, four, or six years imprisonment if she/he is aware of her/his HIV-positive status and donates blood, body organs or tissues, semen, or breast milk. No intent to transmit HIV or actual transmission of the virus is required. An individual will not be prosecuted under the following circumstances:

- She/he is mentally incompetent;
- Blood is donated and official procedures for “self-deferring” their blood⁵⁰ (indicating that blood should only be used for science purposes, and not for transfusion);
- Donate blood for autologous use (use in another part of the donor’s own body).

⁴⁴ Prior to California’s statutes on HIV exposure and HIV-specific statute enhancements, there were a few cases where persons who knew they were HIV-positive and solicited or engaged in prostitution faced penalties under general criminal laws. In 1987, an HIV-positive sex worker was charged with attempted murder and her pimp was charged with pimping and willfully exposing another to a contagious disease. However, the charges were later dropped when a witness refused to testify. *Main News: The State*, LOS ANGELES TIMES, July 24, 1987, at 2.

⁴⁵ See above discussion of California sentencing laws for a list of sex offenses covered under this statute; *See also* CAL. PENAL CODE § 647F (West 2010); CAL. PENAL CODE § 18 (West 2010).

⁴⁶ CAL. PENAL CODE § 647(B) (2010).

⁴⁷ *People v. Hall*, No. B190199, 2007 WL 2121912 (Cal. Ct. App. July 25, 2007).

⁴⁸ *Id.*

⁴⁹ Prior to California’s HIV-specific statute on blood and organ donations, an HIV-positive homeless man was acquitted on charges of attempting to poison a pharmaceutical product after selling his blood. Terry Pristin, *Jury Frees AIDS Victim Who Sold Infected Blood*, LOS ANGELES TIMES, March 3, 1998, at 1.

⁵⁰ *See* CAL. HEALTH & SAFETY CODE § 1603.3(B) (West 2010).

HIV-positive persons have also been convicted under general criminal charges.⁵¹

In *Beuford v. People*, the California Court of Appeals confirmed a conviction for, amongst other charges, making criminal threats.⁵² The defendant was resisting arrest and, while spitting at the officers, made comments including, “I’ll make your life miserable because I’m infected with HIV.” A criminal threat under California law is a threat that is intended to and does cause fear in the person threatened.⁵³ The State must prove that (1) the defendant threatened to kill or inflict bodily injury on another person, (2) intended the threat to be understood as such, (3) communicated the serious intention that the threat would be carried out, (4) the threat caused the person to be in fear and (5) such fear was reasonable. The court held that the language and actions of the defendant could reasonably be found to be criminal threats by a jury.

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⁵¹ In a 1987 case, the defendant successfully sued the San Diego Police Department for taking and testing his blood for HIV without consent or by warrant after he bit the officers. *Barlow v. County of San Diego*, 190 Cal. App. 3d 1652 (Cal. Ct. App. 1987). He was originally charged with intent to kill and inflict great bodily harm on the officers. A jury later acquitted him of all criminal charges. *Barlow v. Ground*, 943 F.2d 1132 (9th Cir. 1991)

⁵² No. B196860, 2008 WL 5091389 (Cal. Ct. App. Dec. 4, 2008).

⁵³ CAL. PENAL CODE § 422 (West 2010).

Colorado Statute(s) that Allow for Criminal Prosecution based on HIV Status:**COLO. REV. STAT. § 18-3-415.5*****Sentence enhancement***

If it is proven beyond a reasonable doubt that a person had notice of his or her HIV infection prior to the date that he or she committed a sexual offense, the judge shall sentence the person to a mandatory term of incarceration of at least three times the upper limit of the presumptive range for the level of offense committed, up to the remainder of the person's life. "Sexual offense" refers to sexual offenses consisting of sexual penetration as defined in COLO. REV. STAT. § 18-3-401(6). *See also* COLO. REV. STAT. § 18-1.3-1004.

COLO. REV. STAT. § 18-7-201.7***Prostitution with knowledge of being HIV-positive***

Any person who, in exchange for money or any other thing of value, performs or offers or agrees to perform, with any person not her/his spouse, any act of sexual intercourse, oral sex, masturbation or anal intercourse and does so with knowledge of having tested positive for HIV, is guilty of a Class 5 felony.

COLO. REV. STAT. § 18-7-205.7***Patronizing a prostitute***

Any person with knowledge of being infected with HIV who patronizes a prostitute is guilty of a Class 6 felony. ("Patronizing a prostitute" is defined in Colo. Rev. Stat. § 18-7-205). This law does not apply to spouses.

COLO. REV. STAT. § 18-1.3-401***Felonies classified – presumptive penalties***

Class 5 felony sentence: minimum one-year imprisonment, maximum three years imprisonment.

Class 6 felony sentence: minimum one-year imprisonment, maximum eighteen months imprisonment.

The prison sentences of HIV-positive persons convicted of sex offenses may be severely increased due to HIV status.

Individuals living with HIV in Colorado should be aware that they may receive prison sentences dramatically above those of HIV-negative persons if they are convicted of a sex offense, including rape and sexual assault, regardless of whether their alleged conduct exposed others to a significant risk of HIV transmission or if they had the intent to expose others to HIV. Specifically, if an HIV-positive person is convicted of a sexual offense involving penetration and aware that she/he is HIV-positive, a sentencing judge is required to impose a sentence of at least three times the upper limit of the normal sentencing range which could extend to the remainder of a person's natural life.⁵⁴ "Penetration" is defined as penile-vaginal sex, oral sex, oral stimulation of the anus, or anal sex.⁵⁵ Even under the most lenient application of this statute, penalties for sexual assault would be elevated from six to eighteen years.⁵⁶

The use of protection during a sexual offense is not a defense, no ejaculation or emission of bodily fluid is required, and any degree of penetration, however slight, is sufficient to support the imposition of an increased sentence.⁵⁷ The actual likelihood of HIV transmission during a sexual assault is not a consideration. Neither the intent to transmit HIV nor actual transmission is required.

HIV exposure cases have been prosecuted under general criminal laws in Colorado.

Incidents of HIV exposure in Colorado have been prosecuted under a variety of general criminal laws, including reckless endangerment statutes, regardless of the actual likelihood of transmission. In a 1999 case, an HIV-positive man was charged with attempted manslaughter when, knowing his HIV status, he did not use a condom during anal sex with a twelve-year old boy.⁵⁸ The man was eventually convicted of two counts of sexual assault and reckless endangerment, an originally lesser included offense for an attempted murder charge, for failing to use a condom during the sexual encounter, even though he knew he was HIV-positive.⁵⁹ Reckless endangerment is defined as exposing another to a "substantial risk of serious bodily injury"⁶⁰ and a conscious disregard of a substantial and unjustifiable risk. Reckless endangerment statutes do not require proof of purpose or intent to transmit HIV, nor does it matter if HIV is actually transmitted, as long as there was a "risk" of transmission.

Felony menacing charges may also apply if an HIV-positive person attempts to or succeeds in placing another in fear of "imminent serious bodily injury."⁶¹ Menacing is defined as a person knowingly, by threat or physical action, placing another in fear of imminent serious bodily injury and

⁵⁴ COLO. REV. STAT. § 18-3-415.5 (2004).

⁵⁵ § 18-3-401 (2004).

⁵⁶ § 18-1.3-401(1)(v)(A) (2) (2004).

⁵⁷ *Id.*

⁵⁸ *People v. Dembry*, 91 P.3d 431, 433 (Colo. Ct. App. 2003); Erin Emery, *Sex-assault Suspect Worked as Counselor*, DENVER POST, Feb. 20, 1999, at B-01.

⁵⁹ *Dembry*, 91 P.3d at 433.

⁶⁰ COLO. REV. STAT. § 18-3-208 (2004).

⁶¹ § 18-3-206.

is a Class 5 felony if it is committed by a deadly weapon or by representing that the person is armed with a deadly weapon.⁶² In *People v. Shawn*, the Colorado Court of Appeals held that a person's HIV-positive status could be a deadly weapon for the purposes of the menacing statute because HIV is capable of causing significant injury.⁶³ In that case, an HIV-positive man was convicted of menacing when he allegedly scratched and pinched a store manager, broke his skin, and shouted "I'm HIV-positive, let go of me, let go of me." Despite the fact that the store manager was not placed in fear of serious bodily injury, the court concluded that the defendant's statements were intended to cause such fear and, as such, were menacing. The court also determined that HIV was a deadly weapon, because a deadly weapon does not have to be *likely* to cause serious bodily injury, only *capable* of doing so.⁶⁴ The court determined that "the dangers of HIV are widely known," and the man's HIV status was "used" as a weapon when he broke the store manager's skin, giving himself "ready access to means of transmitting HIV."⁶⁵

In *People v. Perez*, an HIV-positive man in Colorado was convicted of attempted extreme indifference murder⁶⁶ and two counts of sexual abuse when he allegedly made his step-daughter engage in masturbation, oral sex, and penile-vaginal sex while knowing that he was HIV-positive.⁶⁷ On appeal, the defendant argued that he did not act with the "universal malice" necessary for the attempted murder conviction. The crime of extreme indifference murder (now known as murder in the first degree) requires that, with an attitude of universal malice manifesting in extreme indifference to the value of human life, the defendant knowingly engages in conduct which creates a great risk of death to another person, and thereby causes the death of another.⁶⁸ "Universal malice" is defined as the "depravity of the human heart which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim," and is aimed at conduct that places the lives of many people in danger without focusing on any one person's life in particular.⁶⁹ On appeal the Colorado Court of Appeals found that there was not sufficient evidence to show that there was any universal malice because the defendant knew the victim, and his conduct was directed towards her and her alone, as opposed to other unknown victims. On this basis, the attempted murder conviction was overturned.

Other cases of HIV exposure being prosecuted under general criminal laws in Colorado include:

- In 2009, an HIV-positive man pleaded guilty to felony child abuse and was sentenced to fifteen years imprisonment after he failed to tell his pregnant fiancée that he was HIV-positive.⁷⁰ His fiancée and son tested positive for HIV after

⁶² *Id.*

⁶³ 107 P.3d 1033, 1036 (Colo. App. 2004).

⁶⁴ *Id.* at 1036

⁶⁵ *Id.* at 1037

⁶⁶ The crime has since been renamed "murder in the first degree." COLO. REV. STAT. § 18-3-102 (2004).

⁶⁷ 972 P.2d 1072, 1073 (Colo. App. 1998).

⁶⁸ COLO. REV. STAT. § 18-3-102(d) (2004).

⁶⁹ *Perez*, 107 P.3d at 1074, (citing *Longinotti v. People*, 102 P. 165, 168 (Colo. 1909)).

⁷⁰ *Man Gets 15 Years for Infecting Son with HIV*, CBS4DENVER.COM, July 18, 2009, <http://cbs4denver.com/crime/prison.sentence.infecting.2.1091727.html>.

doctors were puzzled why the four-month-old baby wasn't gaining weight and had pneumonia.⁷¹

- In June 2010, an HIV-positive man was charged with assault with a “deadly weapon” after he allegedly spat on a technician while being fitted for an electronic monitoring bracelet. His charge was later reduced to misdemeanor harassment.⁷²

It is a felony to solicit prostitution while HIV-positive.

Individuals living with HIV/AIDS in Colorado will face felony charges for engaging in prostitution with knowledge of their HIV-positive status. It is a Class 6 felony punishable by up to eighteen months in prison and/or a \$1,000 fine to “patronize” a prostitute after testing positive for HIV.⁷³ “Patronizing” a prostitute is defined as (1) engaging in sexual or “deviate sexual conduct” with a prostitute, or (2) entering or remaining in a “place of prostitution” with intent to engage in such acts.

Although the meaning of “deviate sexual conduct” is not defined, Colorado defines “sexual intercourse” for the purposes of prostitution as penile-vaginal sex, oral sex, masturbation, and anal sex in exchange for money or things of value.⁷⁴

It is a felony to engage in prostitution while HIV-positive.

It is a Class 5 felony punishable by up to three years in prison and/or a \$1,000 fine for a person who is aware of her/his HIV-positive status to perform, offer to perform, or agree to perform any act of penile-vaginal sex, oral sex, masturbation, or anal sex in exchange for money or any other thing of value.⁷⁵

In July 2007, an HIV-positive sex worker in Denver was arrested after a police officer saw him offering to perform sexual acts for money. The man was charged with engaging in prostitution with knowledge that he was HIV-positive⁷⁶ and received an eighteen-month prison sentence after pleading guilty to attempted prostitution. Following another arrest in November 2009, he was once again charged for prostitution with knowledge of being HIV-positive.⁷⁷

The solicitation and prostitution statutes punish individuals for being HIV-positive, regardless of whether or not they exposed another to a significant risk of HIV transmission. Because intent to engage in prostitution is punishable, an HIV-positive person may be imprisoned regardless of whether there was any sexual conduct that could have resulted in HIV transmission or if one's HIV

⁷¹ Jessica Zartler, *HIV Positive Man Charged with Child Abuse*, NBC11NEWS.COM, Jan. 6, 2009, <http://www.nbc11news.com/home/headlines/37152584.html>.

⁷² Joseph Boven, *Denver HIV-positive Man Charged With Using Spit as a Deadly Weapon*, COLORADO INDEPENDENT, June 9, 2010, <http://coloradoindependent.com/55114/denver-hiv-positive-man-charged-with-using-spit-as-deadly-weapon>; Felisa Cardona, *DA Drops Felony in Alleged Spitting*, DENVER POST, June 12, 2010, at B-03.

⁷³ COLO. REV. STAT. § 18-7-205.7 (2004); § 18-1.3-401(v)(a).

⁷⁴ § 18-7-201.

⁷⁵ § 18-7-201.7.

⁷⁶ Manny Gonzales, *Hooker Tells Cop at Arrest He Has AIDS*, DENVER POST, July 18, 2007, at B-05.

⁷⁷ *HIV-Positive Man Charged with Prostitution*, THE DENVER CHANNEL, Nov. 10, 2009, <http://www.thedenverchannel.com/news/21577633/detail.html>.

status would have been disclosed to the sexual partner. Neither the intent to transmit HIV or actual HIV transmission are required and using condoms or other protection is not a defense.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Connecticut Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statutes regarding HIV exposure

There are no statutes explicitly criminalizing HIV transmission or exposure in Connecticut. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault.

At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Connecticut.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Delaware Statute(s) that Allow for Criminal Prosecution based on HIV Status:**DEL. CODE ANN. tit. 16, § 2801(C)*****Donating***

No person may intentionally, knowingly, recklessly, or negligently use the semen, corneas, bones, organs, or other human tissue of a donor unless they have been tested for HIV or required as a life-saving measure. No person may knowingly, recklessly, or intentionally use the semen, corneas, bones, organs, or other human tissue of a donor who has tested positive for exposure to HIV or any other identified causative agent of AIDS.

There is no explicit statute criminalizing HIV exposure except for donations

There are no statutes explicitly criminalizing HIV transmission or exposure in Delaware other than in the context of organ, tissue, or semen donations. Under Delaware public health laws, it is a felony to fail to test for HIV or to knowingly, recklessly, or intentionally use the semen, corneas, bones, organs, or other human tissues donations of a person who has tested positive for HIV.⁷⁸ Violation of this statute is punishable by up to five years in prison. Sperm and tissue banks must follow state regulations for the testing and disposal of tissue donations found to be positive for HIV.⁷⁹

Though Delaware does not have other HIV criminal exposure statutes, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault in other states. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of a person's HIV status in Delaware.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

⁷⁸ DEL. CODE ANN. tit. 16, § 2801(C) (2010); DEL CODE ANN. tit. 11, § 4205.

⁷⁹ See generally *id.* 16, § 2801.

District of Columbia Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statutes criminalizing HIV exposure

There are no statutes explicitly criminalizing HIV transmission or exposure in the District of Columbia, and as of the date of publication the authors are not aware of any cases of prosecutions or sentence enhancements of individuals in the District of Columbia based on the HIV status of a defendant.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Florida Statute(s) that Allow for Criminal Prosecution based on HIV Status:

FLA. STAT. ANN. § 384.24(2)

Unlawful acts relating to HIV exposure

It is unlawful for any person who has HIV, with knowledge of such infection and having been informed that she/he may communicate it to others through sexual intercourse, to have sexual intercourse with any other person, unless the other person has been informed of the presence of HIV and has consented to the sexual intercourse. A violation of this statute is a third-degree felony. It is a first-degree felony if there were multiple violations of this statute. FLA. STAT. ANN. §384.34(5).

FLA. STAT. ANN. §381.0041(11)(B)

Donation or transfer of human tissue

Any person who knows she/he has HIV and has been informed that by donating blood, organs, or human tissues he or she may communicate HIV to another person, and with this knowledge donates blood, organs, plasma, skin, or human tissue is guilty of a felony of the third degree.

FLA. STAT. ANN. § 796.08(5)

Prostitution with knowledge of HIV-positive status

A person who commits prostitution, offers to commit prostitution or (by engaging in sexual activity likely to transmit HIV) procures another for prostitution, and who had previously tested positive for HIV and knew or had been informed of the test result and of the possibility of transmission to others through sexual activity is guilty of a third-degree felony.

FLA. STAT. ANN. § 775.0877

Criminal “transmission” of HIV (repeat offenses)

A person who pleads guilty or nolo contendere to, or is convicted of, committing or attempting to commit one of the crimes that is listed in subsection (1) of this statute [pertaining to sex or assault/battery offenses] and involves the transmission of bodily fluids from one person to another, who subsequently tested positive for HIV and was informed of that test result, and who then again commits one of the crimes listed in subsection (1) is guilty of criminal transmission of HIV, a felony of the third degree. The offenses listed in subsection (1) include, among others, sexual assault, incest, child abuse, indecent assault upon a minor child, sexual performance by a minor, donation of contaminated blood, assault, and battery.

FLA. STAT. ANN. § 775.082

Penalties: third-degree felony

Conviction of a felony of the third degree can result in a sentence of imprisonment not exceeding five years.

Penalties: second-degree felony

Conviction of a felony of the second degree can result in a sentence of imprisonment not exceeding 15 years.

Penalties: first-degree felony

Conviction of a felony of the first degree can result in a sentence of imprisonment not exceeding 30 years.

FLA. STAT. ANN. § 775.083

Fines

A person convicted of an offense other than capital felony may be sentenced to pay a fine, in addition to any punishment described in s. 775.082; Fines for designated crimes and for noncriminal violations shall not exceed \$5,000 when the conviction of a felony is for the third degree.

HIV-positive persons may face felony charges for failing to disclose their status to sexual partners.

In Florida, one may be prosecuted for failing to disclose HIV status to sexual partners. It is a third-degree felony, punishable by up to five years in prison and/or a \$5,000 fine,⁸⁰ if an HIV-positive person (1) knows that she/he is HIV-positive, (2) has been informed that HIV may be transmitted during sexual intercourse,⁸¹ and (3) has sexual intercourse with any other person without disclosing

⁸⁰ FLA. STAT. ANN. §§ 775.082-775.083 (West 2010).

⁸¹ "Sexual intercourse" is defined as the "penetration of the female sex organ by the male sex organ, however slight, emission of semen is not required. § 826.04 (statute on Incest). However, Florida's HIV exposure statute has also been applied to sexual intercourse between two men, therefore, the definition of sexual intercourse as per FLA. STAT. ANN. § 384.24(2) is not limited to only male-female sexual intercourse. There is no statutory indication whether oral sex is considered "sexual intercourse."

her/his HIV status.⁸² It is a first-degree felony punishable by up to thirty years imprisonment if there is a failure to disclose one's HIV status on multiple occasions.⁸³

Florida's statute penalizes conduct where HIV-positive persons know their status and engage in sexual conduct, including penile-vaginal sex and anal sex, which may expose others to HIV. It is an affirmative defense if a sexual partner knows of her/his sexual partner's HIV status and consents to engage in sexual conduct with that knowledge.⁸⁴ It is not a defense to prosecution if protection, such as a condom, was used during sex. Neither the intent to transmit HIV nor HIV transmission is required for prosecution.

The following cases illustrate prosecutions under this statute:

- In February 2010, a 45-year-old, HIV-positive man was charged with a first-degree felony of unlawful acts related to HIV exposure after allegedly failing to tell his sexual partner that he was HIV-positive during their long-term, romantic, sexual relationship.⁸⁵
- In August 2009, a 39-year-old, HIV-positive woman was arrested after she allegedly had unprotected sex with a man and lied about her HIV status.⁸⁶
- In July 2010, a 39-year old, HIV-positive man was arrested after he allegedly had unprotected sex with a woman, also without disclosing his HIV status.⁸⁷ The man's partner tested positive for HIV.

Donation of blood, organs, or other human tissues to others is a third-degree felony.

HIV-positive persons in Florida should be aware that they may receive up to five years in prison and/or a \$5,000 fine⁸⁸ if they know their HIV-positive status and donate their blood, plasma, organs, skin, or human tissues.⁸⁹ It is a defense if the HIV-positive person has not been informed that HIV can be transmitted through human blood, plasma, organ, and tissue donations. Neither the intent to transmit HIV nor actual transmission of the virus is required.

Engaging in prostitution with knowledge of one's HIV-positive status is a felony.

⁸² § 384.24(2).

⁸³ § 384.34(5) ("any person who commits multiple violations of s. 384.23(2) commits a felony of the first degree"); *See also* §§ 775.082-775.083.

⁸⁴ *Id.*

⁸⁵ Katie Thomas, *Equestrian Charged with HIV-Related Offenses*, N.Y. TIMES, Apr. 12, 2010, at A12.

⁸⁶ *HIV-positive Woman Arrested*, OCALA, Aug. 14, 2009, <http://www.ocala.com/article/20090814/ARTICLES/908149971>.

⁸⁷ *Jacksonville Man Arrested for Criminal Transmission of HIV*, FIRSTCOASTNEWS.COM, July 5, 2010, <http://www.firstcoastnews.com/news/local/news-article.aspx?storyid=158235&catid=3#comments>. 908149971.

⁸⁸ FLA. STAT. ANN. §§ 775.082-775.083.

⁸⁹ § 381.0041(11)(a).

Up to five years imprisonment and/or a \$5,000 fine⁹⁰ can be imposed upon conviction if an individual (1) has tested positive for HIV, (2) been informed that HIV can be transmitted through sexual activity, and (3) commits prostitution, offers to commit prostitution, or procures another for prostitution by engaging in sexual activity in a manner likely to transmit HIV.⁹¹

Neither the intent to transmit HIV, actual transmission, or engaging in activities known to transmit HIV are required for prosecution.

Florida defines “prostitution” as the “giving or receiving of the body for sexual activity for hire.” Much of what Florida defines as “sexual activity” does not transmit HIV, including:⁹² anal or vaginal penetration of another by *any* other object and the handling or fondling of another for the purpose of masturbation. In these instances, sex workers can face penalties for conduct that has absolutely no risk of exposing another to HIV.

In HIV exposure cases involving prostitution, disclosure of HIV status is not a defense, whether condoms or other protection was used is not a consideration, and ejaculation or the exchange of bodily fluids known to transmit HIV is not required for prosecution.

Though there is an HIV-specific statute for sex workers, many of the reported cases of prosecutions of HIV-positive sex workers have fallen under the criminal “transmission” of HIV statute (see section below on page 32). The only prosecutions of sex workers on record that have not fallen under the criminal “transmission” statute occurred prior to many of Florida’s HIV-specific laws being enacted:

- In 1988, an HIV-positive male sex worker was sentenced to five years imprisonment based on his HIV status.⁹³
- In August 2009, a 32-year old, HIV-positive sex worker was arrested under Florida’s criminal exposure prostitution statute after she offered to perform a sexual act on an undercover officer for \$20.⁹⁴

Prosecution under this statute is also possible if an HIV-positive individual “procures” another for prostitution by engaging in sexual activity in a “manner likely to transmit” HIV.⁹⁵ At least one case in Florida suggests that “procurement” goes beyond mere solicitation and finds that it requires the inducement of another to provide sexual services to a third party (i.e., a pimp).⁹⁶ The meaning of “likely to transmit HIV” is not defined. If “likely” is construed to mean more probable than not, few if any sexual activities would be likely to transmit HIV.⁹⁷

Prosecution for HIV exposure in Florida has occurred under general criminal laws.

⁹⁰ §§ 775.082-775.083.

⁹¹ § 796.08(5).

⁹² § 796.07.

⁹³ Mark Journey, *AIDS Carrier in Jail for Soliciting*, ST. PETERSBURG TIMES, Aug. 15, 1990, at 1B.

⁹⁴ Jason Schultz, *Riviera Woman With HIV Charged with Prostitution*, PALM BEACH POST, Aug. 21, 2009, at 2B.

⁹⁵ FLA. STAT. ANN. § 796.08(5)(West 2010).

⁹⁶ See generally *Register v. State*, 715 So.2d 274, 278 (Fla. Dist. Ct. App. 1998) (comparing the meanings of “solicitation” and “procurement” under a statute criminalizing procurement of a minor for prostitution).

⁹⁷ Carol L. Galletly & Steven D. Pinkerton, *Toward Rational Criminal HIV Exposure Laws*, 32 J.L. MED. & ETHICS 327, 330 (2004).

At least one case has found that HIV can be considered a deadly weapon for prosecution under general criminal law. In August 2009, a 35-year-old, HIV-positive man in Florida was charged with attempted murder when he allegedly yelled that he had HIV and threatened to kill a police officer with HIV before biting him in the shin and leaving a permanent bruise.⁹⁸ He was later convicted of aggravated battery on a law enforcement officer and sentenced to fifteen years in prison. The crime of aggravated battery requires that a person intentionally and knowingly causes great bodily harm or uses a deadly weapon.⁹⁹ Many HIV-positive persons convicted of aggravated assault or aggravated battery have been convicted based on their HIV status, with courts finding that the defendant's teeth or bodily fluids (including saliva) used in the assault are "deadly weapons." The officer did not test positive for HIV.

During the trial, the Florida prosecutor told the jury that the police officer had to avoid intimate "contact with his wife or children for fear he could severely affect them," because he was bitten by an HIV-positive person. This statement ignores the fact that the CDC has concluded that there exists only a "remote" possibility that HIV could be transmitted through a bite, and such transmission would have to involve various aggravating factors including "severe trauma, extensive tissue damage, and the presence of blood."¹⁰⁰ The scientific and factual misrepresentations created by criminal HIV exposure laws and the prosecutions of HIV-positive persons only increase the risk that HIV-positive individuals may be prosecuted for conduct that cannot transmit HIV.

HIV-positive persons may face additional felony penalties for committing or attempting to commit an identified crime(s) after a previous conviction for a similar offense.

An HIV-positive person who commits one of the crimes enumerated by statute after a previous conviction for a statutorily enumerated offense can face additional felony charges. Under Florida law, an individual must be tested for HIV if she/he is convicted of, pleads guilty to, or pleads no contest to an offense or attempted offense involving the transmission of bodily fluids (i.e. the sex-based or assault/battery offenses noted in the statute).¹⁰¹ If an individual tests positive for HIV, knows of her/his HIV status, and commits another such offense involving the transmission of bodily fluids she/he is guilty of an additional felony, punishable by up to five years in prison and/or a \$5,000 fine.¹⁰² Although this statute is labeled a "criminal transmission" law, actual transmission of HIV is *not* required.¹⁰³

Felonies that may trigger additional penalties under this statute include:¹⁰⁴

- Sexual battery
- Incest
- Lewd, lascivious, or indecent assault upon any person less than 16 years of age

⁹⁸ David Ovalle, *HIV-Positive Man Who Bit Officer Gets 15 Year Sentence*, Miami Herald, MIAMIHERALD.COM, Aug. 27, 2009, <http://www.miamiherald.com/2009/08/27/1203987/hiv-positive-man-who-bit-officer.html>.

⁹⁹ FLA. STAT. ANN. § 784.045 (West 2010).

¹⁰⁰ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

¹⁰¹ FLA. STAT. ANN. § 775.0877 (West 2010).

¹⁰² § 775.0877 (4); §§ 775.082-775.083.

¹⁰³ § 775.0877(5).

¹⁰⁴ §§ 775.0877(1)(a)-(n).

- Assault or aggravated assault
- Battery or aggravated battery
- Child abuse or aggravated child abuse
- Abuse or aggravated abuse of any elderly person or disabled adult
- Sexual performance by a person less than 18 years of age
- Prostitution
- Donation of blood, plasma, organs, skin, or other human tissue

It is an affirmative defense to prosecution under this statute if the person exposed knew that the offender was infected with HIV, knew that the action being taken could result in transmission of the HIV infection, and consented to the action voluntarily.¹⁰⁵

Although the statute enumerates several underlying offenses, the authors are only aware of this law applying in prosecutions of sex workers so far, despite the fact that there is a separate HIV-specific prostitution statute. Such prosecutions include:

- In 2007, a female sex worker was charged with criminal “transmission” of HIV for offering an undercover officer oral sex.¹⁰⁶
- A woman was charged with prostitution, resisting arrest, and criminal “transmission” of HIV after negotiating the price of a sex act with an undercover officer.¹⁰⁷ Prosecutors had also considered charging her with attempted murder, even though she told the officer after her arrest that she had HIV and also had condoms in her purse.

Florida courts have also imposed sentencing enhancements based on HIV status.

Early in the epidemic, Florida courts imposed sentence enhancements based on a person’s HIV-positive status. The cases noted here are from the late 1980s and mid-1990s, and there are no recent cases, to the authors’ knowledge, demonstrating that Florida courts continue to apply sentence enhancements based on HIV status. The following cases are included as a comprehensive review of Florida’s approach to HIV criminalization, but are not necessarily reflective of current trends in criminal sentencing in Florida.

In *Morrison v. State*, the HIV-positive defendant was convicted of aggravated battery and was sentenced to ten years imprisonment and ten years of parole.¹⁰⁸ The trial court justified its departure from the sentencing guidelines because in the course of the robbery the defendant bit a 90-year-old man to the bone who later tested positive for HIV. Confirming the lower court’s sentencing, the court of appeals held that the departure was justified due to the nature of the crime and that HIV could give rise to AIDS.

One Florida case has held that an HIV-positive defendant’s status could be enhanced even if there was no proof that the defendant knew he was HIV-positive at the time of the crime. In *Cooper v.*

¹⁰⁵ §775.087(6).

¹⁰⁶ Michael Scarcella, *Woman Charged with Exposing Men to HIV*, HERALD TRIBUNE, Oct. 10, 2007, at BCE5.

¹⁰⁷ Sue Carlton, *HIV-Positive Woman Free of Attempted Murder Charge*, ST. PETERSBURG TIMES, June 18, 1996, at 4B.

¹⁰⁸ 673 So.2d 953 (Fla. Dist. Ct. App. 1996).

State,¹⁰⁹ the defendant was convicted of aggravated battery, solicitation, and sexual battery and sentenced to thirty years imprisonment, reflecting an upward departure from the sentencing guidelines. Four days prior to trial, the defendant received test results that showed he had tested positive for HIV. Though the jury never received this information, the sentencing judge found that the defendant's total disregard of the likelihood that the complainant would be exposed to HIV through the sexual contact supported an enhanced sentence. On appeal, the court agreed with the sentencing holding that "[b]ecause of his lifestyle, Cooper knew or should have that he had been exposed to the AIDS virus and that by sexual battery upon his victim there was a strong likelihood that the victim would be exposed to AIDS."¹¹⁰ By "lifestyle" the court was referring to the fact that the defendant had been a "homosexual for years."¹¹¹ There was no evidence presented that showed Cooper knew of his HIV status at the time of the assault and, in fact, had only tested positive immediately before trial. This opinion rests on the assumption that gay men should know that they have been exposed to HIV even though they have not tested positive.

In *Brooks v. State*,¹¹² a judge sentenced a sex worker convicted of theft to a sentence above the state sentencing guidelines because she had AIDS, despite the fact that the crime had nothing to do with her HIV status. On appeal, the sentence was reversed because her HIV status was in no way relevant to the crime.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

¹⁰⁹ 539 So. 2d 508 (Fla. Dist. Ct. App. 1989).

¹¹⁰ *Id.* at 511.

¹¹¹ *Id.* at 512.

¹¹² 519 So.2d 1156 (Fla. Dist. Ct. App. 1988).

Georgia Statute(s) that Allow for Criminal Prosecution based on HIV Status:**GA. CODE ANN. § 16-5-60(C)*****Reckless conduct; HIV-infected persons******Felony (punishable by imprisonment for not more than ten years)***

Any person who knows that she/he is HIV-infected is guilty of a felony if she/he, without first disclosing her/his HIV status, (1) knowingly has sexual intercourse or performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person; (2) knowingly shares a hypodermic needle or syringe with another person; (3) offers or consents to perform an act of sexual intercourse for money; (4) solicits another to perform or submit to an act of sodomy for money; or (5) donates blood, blood products, other body fluids, or any body organ or body part.

GA. CODE ANN. § 16-5-60(D)***Reckless conduct; HIV-infected persons******Felony (punishable by imprisonment for between five & twenty years)***

A person who knows she/he is HIV-infected who commits an assault with the intent to transmit HIV, using her/his body fluids (blood, semen, or vaginal secretions), saliva, urine, or feces upon a peace or correctional officer while the officer is engaged in the performance of her/his official duties or on account of the officer's performance of her/his official duties is guilty of a felony.

HIV-positive status must be disclosed to sexual partners to avoid criminal penalties.

Georgia's HIV exposure statute targets HIV-positive persons who fail to disclose their HIV status prior to engaging in anal, oral, and penile-vaginal sex with another person. A violation of the statute results in felony penalties of up to ten years imprisonment. Neither the intent to transmit HIV nor the actual transmission of HIV is necessary for prosecution.

Disclosure of one's HIV status is the only affirmative defense to prosecution. A defendant's viral load is not a consideration, and it is no defense if protection, such as a condom, was used during sexual activities. It is a violation of the statute even if an HIV-positive person fails to disclose her/his status and performs oral sex on an HIV-negative person despite the fact that there is at best a remote risk of HIV exposure from such activity.

Though disclosure is a defense to prosecution, there are difficulties in proving whether or not

disclosure actually occurred in these situations and such evidence normally depends on the words of one person against another. In a 2008 case, an HIV-positive woman was sentenced to eight years imprisonment and two years probation for reckless conduct when she allegedly engaged in unprotected sexual intercourse without disclosing her HIV status.¹¹³ She was convicted, despite the fact that two witnesses testified that the woman's sexual partner was aware of her HIV-positive status, and the defendant testified that her sexual partner knew her HIV-positive status because it had been published on the front page of a local newspaper.

In a January 2009 case, a 38-year-old man from Georgia was sentenced to two years in jail and eight years probation after pleading guilty to reckless conduct for having sex with a woman without telling her he was HIV-positive.¹¹⁴ The HIV-positive man and his partner, who tested negative for HIV, met at a housing center for people living with HIV. The fact that he was living at a home solely for people living with HIV was not enough to be considered disclosure for the purposes of the reckless conduct statute.

In November 2010, an HIV-positive man was charged with rape and reckless conduct for allegedly sexually assaulting a woman.¹¹⁵

Engaging in prostitution without disclosing HIV status is a felony.

Georgia's reckless conduct law imposes criminal penalties for HIV-positive persons who do not disclose their status before engaging in solicitation or acts of prostitution. A maximum sentence of ten years imprisonment can be imposed if an HIV-positive person is aware of her/his HIV status and fails to disclose it before (1) offering or consenting to engage in sexual intercourse for money, or (2) soliciting another to submit to or perform oral or anal sex for money.¹¹⁶ Neither the intent to transmit HIV nor actual transmission is required. A conviction for prostitution is normally a misdemeanor,¹¹⁷ but is prosecuted as a felony based on one's HIV-positive status.

This statute penalizes an individual for being HIV-positive, regardless of whether she/he exposed another to a significant risk of HIV transmission. It is not a defense if protection was used during alleged acts of prostitution because *offering* or *soliciting* to engage in sexual intercourse actual sexual conduct is not required.

HIV-positive status must be disclosed before sharing needles.

Georgia imposes criminal penalties for HIV-positive persons sharing needles or syringes. Up to ten years imprisonment may follow if an HIV-positive individual is (1) aware of her/his HIV status, (2) uses a needle or syringe for the injection of drugs or withdrawal of bodily fluids, and (3) shares that needle with another without disclosing her/his HIV status.¹¹⁸ It is a complete defense if HIV status

¹¹³ Ginn v. State, 667 S.E.2d 712, 713 (Ga. Ct. App. 2008).

¹¹⁴ Amy Leigh Womack, *HIV-Positive Man Sentenced for Not Disclosing HIV Status to Partner*, MACON.COM, Jan. 13, 2009, <http://www.macon.com/2009/01/13/584845/hiv-positive-man-sentenced-for.html>.

¹¹⁵ Andria Simmons, *HIV-positive Man to Stand Trial on Rape Charge*, ATLANTA J. CONST., Nov. 12, 2010, <http://www.ajc.com/news/gwinnett/hiv-positive-man-to-738690.html>.

¹¹⁶ GA. CODE ANN. §§ 16-5-60(c)(3)-(4) (West 2010).

¹¹⁷ § 16-6-9.

¹¹⁸ § 16-5-60(c)(2).

is disclosed before needle-sharing. Neither the intent to transmit HIV nor actual transmission are required.

HIV-positive status must be disclosed before donating blood or body tissues.

It is a felony punishable by up to ten years imprisonment if an HIV-positive individual is aware of her/his HIV status and fails to disclose her/his status before donating blood, blood products (i.e., plasma, platelets), other bodily fluids, or any other body organ or body part.¹¹⁹ Neither the intent to transmit HIV nor actual transmission are required.

Assaulting a peace or correctional officer using bodily fluids with intent to transmit HIV is a felony.

Georgia's reckless conduct/endangerment statute includes a provision that is tailored to cases involving peace officers and correctional officers. It is a felony, punishable by five to twenty years in prison, for individuals who are aware that they are HIV-positive to commit an assault against a peace or correctional officer engaged in her/his duties with the *intent* to transmit HIV using her/his blood, semen, vaginal secretions, saliva, urine, or feces.¹²⁰ This statute punishes conduct that poses only remote possibilities of HIV exposure and, though intent is considered an element of the prosecution, many of the bodily fluids listed cannot transmit HIV.

In *Burk v. State*,¹²¹ an HIV-positive man who allegedly threatened to transmit HIV to a corrections officer was originally charged with aggravated assault with intent to murder after he struck the officer, grabbed his arm, and attempted to bite him. The inmate was later convicted of reckless conduct (what was then referred to as "reckless endangerment"), an offense which required that he disregard a substantial risk of harming or endangering the safety of the officer.¹²² Despite the fact that the CDC has long maintained that there exists only a "remote" possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including "severe trauma, extensive tissue damage, and the presence of blood,"¹²³ the Georgia Court of Appeals found Burk's alleged attempt to bite the officer sufficient to uphold his conviction for reckless conduct. Contrary to the CDC's position, a physician testified at trial that HIV transmission from a human bite was "very strongly probable" and that he "did not see why" HIV could not be transmitted through saliva.¹²⁴ Based off of this testimony, the court affirmed the defendant's conviction, finding that the defendant knowing his HIV status and purposefully biting the officer amounted to reckless conduct, despite the fact that biting was not conduct proscribed under Georgia Code § 16-5-60.

The conviction in *Burke* reflects the issues associated with "expert" testimony on HIV transmission and exposure. HIV-positive persons can be convicted for conduct that presents at best a remote

¹¹⁹ § 16-5-60(c)(5).

¹²⁰ § 16-5-60(d).

¹²¹ 478 S.E.2d 416 (Ga. Ct. App. 1996). *See also* Scroggins v. State, 401 S.E.2d 13 (Ga. Ct. App. 1990) (affirming conviction for aggravated assault with intent to murder for bite on police officer by HIV-positive defendant).

¹²² *Burk*, 478 S.E.2d at 417.

¹²³ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

¹²⁴ *Burk*, 478 S.E.2d at 417.

possibility of HIV exposure or transmission if the expert testimony fails to provide scientifically supported facts on HIV.

HIV-positive persons have also been prosecuted under aggravated assault charges.

In *Scroggins v. State*, the defendant, while struggling with a police officer, sucked extra saliva into his mouth and then bit the officer.¹²⁵ When the defendant was treated at the hospital he told a nurse he was HIV-positive and laughed when the officer who was bit asked the defendant about his status. He was convicted of aggravated assault with intent to murder. On appeal, the Georgia Court of Appeals found that the impossibility of transmitting HIV via a bite and/or saliva was not a defense as long as Scroggins believed HIV could be transmitted in such a manner. The court ruled that a wanton and reckless state of mind could be the equivalent of a specific intent to kill for the purposes of the charges, and that Scroggins biting the officer while knowing that he was HIV-positive was sufficient evidence to establish a wanton and reckless disregard for whether HIV was transmitted.

A person commits aggravated assault when there is an intent to murder, rape, or rob someone using a deadly weapon that does or is likely to result in serious bodily injury.¹²⁶ Despite the fact that the CDC has long maintained that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood,” Georgia’s application of its aggravated assault statute ignores these facts and continues to prosecute HIV-positive persons for acts that, at best, have a remote possibility of transmitting HIV.¹²⁷ The CDC has also concluded that spitting alone has never been shown to transmit HIV.¹²⁸

Other prosecutions under the aggravated assault statute include:

- In August 2009, a 42-year-old, HIV-positive man was charged with aggravated assault after he bit an Atlanta police officer, allegedly shouting “I have full-blown AIDS” and stating that his bite would infect the officer with HIV.¹²⁹ He later received eighteen months for aggravated assault.¹³⁰
- In a July 2008 case, a 43-year-old, HIV-positive woman was charged with aggravated assault when she spat in the face of another person. The woman pleaded guilty and was sentenced to three years in jail.¹³¹

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This

¹²⁵ 401 S.E.2d 13 (Ga. Ct. App. 1990) overruled on other grounds *Dugan v. State*, 502 S.E.2d 726 (Ga. 1998).

¹²⁶ GA. CODE ANN. § 16-5-21 (West 2010).

¹²⁷ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

¹²⁸ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

¹²⁹ Stephanie Ramage, *Too Lenient?*, SUNDAYPAPER.COM, Aug. 30, 2009, <http://www.sundaypaper.com/More/Archives/tabid/98/articleType/ArticleView/articleId/4452/Too-lenient.aspx>.

¹³⁰ *Id.*

¹³¹ *Woman with HIV Gets 3 Years for Spitting in Face*, NBC AUGUSTA, July 23, 2008, <http://www.nbcaugusta.com/news/local/25798434.html?corder=regular>.

information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Hawaii Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute

There are no statutes explicitly criminalizing HIV exposure or transmission in Hawaii. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Hawaii.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Idaho Statute(s) that Allow for Criminal Prosecution based on HIV Status:**IDAHO CODE ANN. § 39-608*****Felony: transfer of bodily fluids which may contain HIV***

Any person who exposes another in any manner with the intent to infect or, knowing that he or she has HIV, transfers or attempts to transfer any of her/his body fluid, tissue, or organs to another person is guilty of a felony.

It is an affirmative defense if:

1. The sexual activity took place between consenting adults after full disclosure by the accused of the risk of HIV transmission.
2. The transfer of body fluid, tissue, or organs occurred after advice from a licensed physician that the accused was noninfectious.

“Body fluid” means semen (with or without sperm), blood, saliva, vaginal secretion, breast milk, and urine.

“Transfer” means:

- Engaging in sexual activity by:
 - Genital-genital contact; or
 - Oral-genital contact; or
 - Anal-genital contact;
- Permitting the use of an unsterilized hypodermic syringe, needle, or similar device; or
- Giving blood, semen, body tissue, or organs for transfer to another person.

Sentences and Fines: Up to 15 years in prison and/or up to a \$5,000 fine.

IDAHO CODE ANN. § 39-601***Misdemeanor: knowingly exposing another to a venereal disease***

It is unlawful for anyone infected with HIV to knowingly expose another person to HIV infection.

To avoid the risk of prosecution, HIV status must be disclosed to sexual partners.

Individuals living with HIV in Idaho should be aware that it is against the law to engage in sexual intercourse without disclosing one's HIV status. It is a felony, punishable by up to fifteen years in

prison and/or a \$5,000 fine, for an HIV-positive person to act with intent, or knowing one's HIV status, to transfer or attempt to transfer bodily fluids through any genital-to-genital, mouth-to-genital, or genital-anal contact.¹³² Though intent to transfer HIV is an element of the crime, simply knowing one's HIV status and failing to disclose that status is enough for prosecution. Actual transmission is not required.

An HIV-positive person engaging or attempting to engage in anal, oral, or vaginal sex has a defense under this statute if she/he can prove that (1) the sex was consensual and (2) her/his partner was informed "of the risk of such activity."¹³³ Informing a partner only of one's HIV-positive status, without disclosing the risk of transmission, is not a sufficient defense on the face of this statute. It is not a defense of condoms, or other protection, was used.

But whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another. In *State v. Thomas*, an HIV-positive man was convicted under Idaho's statute and sentenced to fifteen years in prison for engaging in anal and oral sex, without ejaculating, with a transsexual woman without disclosing his HIV status.¹³⁴ At trial, the defendant questioned his accuser's credibility regarding her denial that he had disclosed his HIV-positive status, suggesting that she had a history of drug use, psychological problems, a reputation "untruthful and dramatic" behavior, and that she had several drinks before having sex with him that would have affected her memory of the evening's events. Friends of the complainant, however, testified that they were in her apartment, could hear her sexual encounter, and when they, knowing of the defendant's status, told her he was HIV-positive, she was very upset and alluded to the fact that she had no knowledge of his HIV status. The Idaho Court of Appeals saw this testimony as sufficient to sustain the jury's guilty verdict despite the contradictions in testimonies.

In 2009, after serving fifteen years in prison, the defendant in *State v. Thomas* pleaded guilty to two more charges of exposing women to HIV. A judge chastised the defendant for giving his sexual partners "a potential death sentence" and sentenced him to thirty years in prison with the possibility of parole after twenty years.¹³⁵ The woman in this case did not test positive for HIV, but transmission of HIV is not an element of the crime and, as such, would not have been a consideration to the conviction. The same defendant was also charged under Idaho's exposure law during a 1990 statutory rape case.¹³⁶

HIV-positive persons prosecuted under Idaho's felony HIV exposure law may have a defense if they can prove that a licensed physician informed them that they were "noninfectious" (could not transmit HIV to others).¹³⁷ This could occur if a person's viral load was undetectable.

In 2010, a man was charged with knowingly transferring bodily fluids with HIV for failing to disclose his status to sexual partners he had met on the Internet.¹³⁸ The man told detectives that he

¹³² IDAHO CODE ANN. § 39-608 (2010).

¹³³ § 39-608(3)(a).

¹³⁴ *State v. Thomas*, 983 P.2d 245, 246 (Idaho Ct. App. 1999).

¹³⁵ Orr, *Former Boise State/NNU Basketball Player Sentenced for Exposing Others to HIV*, IDAHO STATESMAN, Sept. 16, 2009, <http://www.idahostatesman.com/2009/09/16/902407/former-boise-statennu-basketball.html>.

¹³⁶ *Id.*

¹³⁷ IDAHO CODE ANN. § 39-608(3)(b)(2010).

failed to tell his sexual partners, with whom he had had unprotected sex, that he was HIV-positive after he had been booked on an unrelated DUI conviction.

HIV-positive persons have also been prosecuted under Idaho's statute for engaging in acts that are not known to transmit HIV. In *State v. Mubita*,¹³⁹ an HIV-positive man was sentenced to forty-four years in prison (eleven counts of transferring bodily fluids) with a possibility of parole after four years for performing oral sex on his female partner and ejaculating on her thigh.¹⁴⁰ On appeal, defense counsel argued that it was factually impossible to violate Idaho's felony exposure law, intended to criminalize "knowingly expos[ing] another person to AIDS," because oral sex, when being performed by an HIV-positive party, and ejaculating on intact skin, has no, or only a remote, possibility of transmitting HIV. The Idaho Court of Appeals did not go beyond the plain language of Idaho's felony exposure law and found that because the man engaged in oral sex, which is a prohibited act unless there is disclosure, and the law specifically included saliva in its list of "bodily fluids" capable of transmitting HIV, the man violated Idaho Code Ann. §39-608. "Bodily fluids" that can be transferred under Idaho law include saliva and urine in addition to blood, semen, vaginal secretions, and breast milk, despite scientific evidence that HIV is not transmitted through saliva or urine.

Idaho's definition of bodily fluids disregards scientific facts surrounding the risks of HIV transmission, only adding to public confusion concerning how the disease is transmitted and worsening the stigma faced by HIV-positive persons. It ignores the fact that the CDC has long maintained that saliva and urine have not been found to transmit HIV. Breast milk is included in this statute's list of "bodily fluids," but breastfeeding is not included in a list of activities that "transfer" bodily fluids.¹⁴¹

Sharing needles/syringes is a felony.

Idaho's HIV statute specifically targets intravenous drug users and others who share their needles and syringes. To avoid prosecution, HIV-positive individuals should not share needles, syringes, and similar drug paraphernalia capable of transferring fluids through the skin. It is a felony, punishable by up to fifteen years in prison and/or a \$5,000 fine, for an individual who is aware that she/he is HIV-positive to "transfer" bodily fluids by allowing others to use their hypodermic syringes, needles, or similar devices without sterilization.¹⁴²

Neither the intent to transmit HIV nor actual transmission is required for conviction. Disclosure of HIV status is not a defense to a syringe-sharing charge, it is only a defense for sexual activity.¹⁴³ An HIV-positive person sharing needles or syringes only has a defense to prosecution if she/he can

¹³⁸ *Boise Man Charged with Transferring HIV*, IDAHO PRESS TRIBUNE, Sept. 14 2010, http://www.idahopress.com/news/article_bbfc76ac-c032-11df-9d38-001cc4c002e0.html.

¹³⁹ 188 P.3d 867, 871 (Idaho 2008).

¹⁴⁰ *Id.* at 883.

¹⁴¹ IDAHO CODE ANN. § 39-608(2)(a)-(b). Christina M. Schriver, *State Approaches to Criminalizing the Exposure of HIV*, 21 N.ILL.U.L. Rev. 319, 328 (2001).

¹⁴² IDAHO CODE ANN. § 39-608(2)(b)(2010).

¹⁴³ § 39-608(3)(a).

prove that a licensed physician advised them that they were “noninfectious” (not capable of infecting others with HIV).¹⁴⁴

HIV status must be disclosed before donating blood, semen, body tissues, or organs.

It is a felony, punishable by up to fifteen years in prison and/or a \$5,000 fine, for an individual who is aware that she/he is HIV-positive to “transfer” bodily fluids to another by giving blood, semen, organs, or body tissues to any person, blood bank, hospital, or medical facility for the purposes of transfer to another person.¹⁴⁵ Neither the intent to transmit HIV nor actual transmission is required. However, an HIV-positive person donating blood, semen, organs, or body tissues does have a defense if she/he can prove that the donation(s) occurred after a licensed physician advised that she/he was “noninfectious” (not capable of infecting others with HIV).¹⁴⁶

Prosecution may result from exposing another to HIV, but the meaning of “exposing” is not defined.

Idaho has a generalized, catch-all HIV exposure statute, Idaho Code Ann. § 39–601, in addition to the felony statute criminalizing such activities as needle-sharing and unprotected sexual intercourse (as discussed above). This is a communicable disease control statute and such statutes are rarely used in prosecutions.

In Idaho it is a misdemeanor for an HIV-positive person to knowingly expose another to HIV infection.¹⁴⁷ The penalties for violating this law are not specified, although penalties for exposing others to syphilis, gonorrhea, or chancroid may include up to six months in prison and/or up to a \$300 fine.¹⁴⁸ Unlike Idaho’s felony exposure statute, discussed above, disclosure is not a defense. Neither the intent to transmit HIV or actual transmission is required.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as substitute for legal advice.

¹⁴⁴ § 39-608(3)(b).

¹⁴⁵ § 39-608(2)(b).

¹⁴⁶ § 39-608(3)(b).

¹⁴⁷ § 39-601.

¹⁴⁸ § 39-607.

Illinois Statute(s) that Allow for Criminal Prosecution based on HIV Status:

720 ILL. COMP. STAT. § 5/12-16.2

“Criminal transmission of HIV”

A person who knows that she/he is infected with HIV commits criminal transmission of HIV if she/he:

- (1) Engages in contact with another person involving the exposure of the body of one person to a bodily fluid of another in a manner that could result in HIV transmission (“intimate contact”);
- (2) Transfers, donates, or provides his or her blood, tissue, semen, organs or other potentially infectious body fluids for administration (e.g., transfusion) to another person; or
- (3) In any way transfers to another any non-sterile IV or intramuscular drug paraphernalia.

The actual transmission of HIV is not a required element of this crime. It is an affirmative defense that the person exposed knew the infected person was HIV-positive, knew the action could result in infection, and consented with that knowledge.

Violation of this statute is a Class 2 felony.

720 ILL. COMP. STAT. § 5/8-4(c)(4)

Penalties for attempt

The sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony.

730 ILL. COMP. STAT. § 5/5-4.5-35 - 40

Penalties

For a Class 2 felony, not less than 3 years in prison and not more than 7 years.

For a Class 3 felony, not less than 2 years in prison and not more than 5 years.

730 ILL. COMP. STAT. § 5/5-4.5-50

Fines

A felony offender may be sentenced to pay a fine not to exceed, for each offense, \$25,000 or the amount specified in the offense, whichever is greater.

HIV-positive persons may be imprisoned for exposing others to their “bodily fluids.”

HIV-positive persons may face prosecution for engaging in a broad range of contact. There have been numerous prosecutions in Illinois for HIV exposure under the state’s HIV-specific “criminal transmission” law. Though the law is entitled “criminal transmission,” neither the intent nor the transmission of HIV is required for prosecution.

It is a Class 2 felony punishable by three to seven years in prison¹⁴⁹ and a \$25,000 fine,¹⁵⁰ for a person who is aware that she/he is HIV-positive to engage in “intimate contact” with another.¹⁵¹ “Intimate contact” with another is defined as the exposure of the body of one person to the bodily fluid of another person in a manner that could result in the transmission of HIV.¹⁵² Prosecutions under the statute have included the following cases:

- In one of Illinois’ earliest prosecutions for HIV exposure, an HIV-positive man pleaded guilty to “criminal transmission” of HIV in February 1992 after sexually assaulting a woman.¹⁵³
- In February 1993, a 37-year old, HIV-positive man was charged with “criminal transmission” of HIV and attempted murder when he allegedly attacked a nurse and stuck her with a needle filled with his blood. The man died before trial.¹⁵⁴
- A 30-year old, HIV-positive sex worker was charged with “criminal transmission” of HIV in May 1999 after she was discovered having sex with a man in exchange for money. A condom wrapper was found at the scene of the woman’s arrest. It is not know whether the man later tested positive for HIV but that would not be relevant to prosecution, nor is it relevant that a condom may have been used during sex.¹⁵⁵
- In October 1999, a 36-year old, HIV-positive man pleaded guilty to “criminal transmission” of HIV after he allegedly threatened police officers with HIV infection and attempted to splatter them with his blood during an interrupted suicide attempt.¹⁵⁶ The man’s wrists were already cut and bleeding before the officers arrived.
- An HIV-positive man was charged with “criminal transmission” of HIV in August 2004 after he sexually assaulted a 17-year old girl.¹⁵⁷ It is not known whether the girl tested positive for HIV but transmission is irrelevant to prosecution.
- In 1993, an HIV-positive man stuck a syringe with his blood into a nurse and was

¹⁴⁹ 730 ILL. COMP. STAT. ANN. 5/5-4.5-35(a) (West 2010).

¹⁵⁰ 5/5-4.5-50(b).

¹⁵¹ 5/12-16.2.

¹⁵² 5/12-16.2(b).

¹⁵³ *Man Pleads Guilty to HIV Transmission*, CHI. TRIB., Feb. 25, 1992, at 3-D.

¹⁵⁴ Christian Hawes, *Man with AIDS Held in Attack*, CHI. TRIB., Feb. 28, 1993, at 3-L; Teresa Jimenez, *HIV Transmission Law Faces a Test*, CHI. TRIB., Feb. 13, 1996, at 1-L.

¹⁵⁵ Mark Shuman, *Prostitution Suspect faces HIV Charge*, CHI. TRIB., May 6, 1999, at 2-NW.

¹⁵⁶ Art Barnum, *Man Pleads Guilty to Trying to Pass HIV*, CHI. TRIB., Oct. 21, 1999, at 1-D.

¹⁵⁷ Patrick Rucker, *HIV-positive Suspect Charged in Rape of Teen*, CHI. TRIB., Aug. 18, 2004, at 3-SSW.

originally charged with criminal transmission of HIV.¹⁵⁸ The charges were later changed to attempted murder but the man died before trial. The nurse did not test positive for HIV.

An individual prosecuted under Illinois' criminal transmission law has an affirmative defense if she/he can prove that the individual exposed to HIV was (1) aware that she/he was HIV-positive, (2) knew that the alleged "intimate contact" could result in HIV infection, and (3) consented to HIV exposure with knowledge of these risks.¹⁵⁹ It is not a defense if condoms or other protection was used during sexual relations, though such use has been demonstrated to be highly effective in preventing HIV transmission.¹⁶⁰

Several individuals in Illinois have been prosecuted for allegedly failing to disclose their positive HIV status to sexual partners. The following cases serve as examples:

- A 39-year old sex worker was charged with "criminal transmission of HIV" in December 1996, when she allegedly failed to disclose to a man that she had AIDS before having sex with him for money.¹⁶¹
- In December 2004, a 33-year old, HIV-positive man was charged with criminal transmission of HIV for having sex with his girlfriend without disclosing his HIV status. The man's HIV status was discovered in a letter from hospital officials during a police search related to another investigation. It is not known whether the woman tested positive for HIV or whether protection was used during sexual intercourse, but these facts would be irrelevant to prosecution.¹⁶²
- A 42-year-old man pleaded guilty to criminal transmission of HIV in 2006 after he failed to disclose his HIV status before engaging in unprotected sex with a 19-year old woman. The man was sentenced to six years in prison.¹⁶³

Illinois' definition of "bodily fluids" for the purpose of its HIV exposure law does not limit its definition only to fluids known to transmit HIV. Even though the CDC has long maintained that saliva, tears, and sweat do not expose others to a risk of HIV transmission, these bodily fluids are not excluded from consideration under Illinois' criminal transmission law.¹⁶⁴ This means that spitting, biting, scratching, and other activities pose, at best, only *theoretical* risks of HIV transmission may be subject to prosecution. There have been numerous prosecutions in Illinois for criminal transmission of HIV stemming from an HIV-positive person biting someone, despite the fact that the CDC has concluded that there exists only a "remote" possibility that HIV could be transmitted

¹⁵⁸ Teresa Jimenez, *HIV Transmission Law Faces A Test*, CHICAGO TRIBUNE, Feb. 13, 1996, at Metro Lake 1.

¹⁵⁹ 720 ILL. COMP. STAT. ANN. 5/12-6.2(3)(d) (West 2010).

¹⁶⁰ CTR. FOR DISEASE CONTROL & PREVENTION, *Condoms and STDs*, <http://www.cdc.gov/condomeffectiveness/latex.htm> (last visited Oct 19, 2010).

¹⁶¹ Mark Shuman, *Woman Accused of HIV Crime*, CHI. TRIB., Dec. 10, 1996, at 3-NW.

¹⁶² Krystyna Slivinski, *Elgin Man Charged with HIV Exposure*, CHI. TRIB., Dec. 16, 2004, at 2-NW.

¹⁶³ Dave Fopay, *Man Pleads Guilty in Coles County for Knowingly Spreading HIV*, HERALD-REVIEW.COM, Feb. 16, 2010, http://www.herald-review.com/news/local/article_77a9af98-13b8-5a12-aa55-88997f84b5b3.html.

¹⁶⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission*, (March 25, 2010), <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”¹⁶⁵

The following case studies illustrate how activities posing only theoretical risks of HIV transmission have been prosecuted in Illinois:

- In March 1993, a 35-year old, HIV-positive woman was charged with criminal transmission of HIV when she allegedly refused to leave a hospital after treatment, biting a security guard and spitting at others in the process.¹⁶⁶ Her bite did not break the guard’s skin.
- In April 1996, a 45-year old, HIV-positive man received a ten-year prison sentence after he allegedly forged a check at a Sam’s Club, fled the store when employees became suspicious, and bit a man attempting to stop him.¹⁶⁷ In addition to fraud and forgery charges, the man was charged with criminal transmission of HIV. The HIV charge was dropped in exchange for a guilty plea on his other charges and a lesser charge of aggravated battery. Despite the fact that biting has been shown to present only a remote risk of transmitting HIV, a state attorney suggested that HIV infection would be a “concern that is going to follow this victim the rest of his life.”
- In January 2006, an HIV-positive man was charged with aggravated battery and criminal transmission of HIV when he allegedly bit a sheriff’s deputy. The man died in a car crash shortly before his initial court hearing.¹⁶⁸

HIV-positive persons have also been imprisoned for *attempting* to transmit HIV, regardless of whether any exposure would have been possible if the task had been completed. In Illinois, it is a Class 3 felony, punishable by two to five years in prison¹⁶⁹ and a \$25,000 fine,¹⁷⁰ to attempt to criminally transmit HIV.¹⁷¹ In a February 2003 case concerning attempt, a 47-year old, HIV-positive woman pleaded guilty to attempted criminal transmission of HIV after leaving a bar with a man to go to his home to engage in intimate contact.¹⁷² She was sentenced to the six months in county jail for time she had already served since her arrest the previous September, plus two years probation.

In Illinois, as in many states, it is not a defense if HIV transmission was impossible under the circumstances.¹⁷³ Even a verbal offer to engage in “intimate contact” may result in prosecution

¹⁶⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

¹⁶⁶ Jerry Crimmins, *Police: Woman with HIV Bit Security Guard*, CHI. TRIB., Mar. 30, 1993, at 2-D.

¹⁶⁷ Teresa Jimenez, *Biter is Given a 10-year Sentence*, CHI. TRIB., Apr. 19, 1996, at 7-N.

¹⁶⁸ Sara Olkon, *2 in Bernwyn Crash Identified*, CHI. TRIB., Aug. 18, 2006, at 1-NRW; Andrew Davis, *Man Killed Has Been Charged with Transmitting HIV*, WINDYCITYMEDIAGROUP.COM, Aug. 23, 2006, <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=12441>.

¹⁶⁹ 730 ILL. COMP. STAT. ANN. 5/5-4.5-40(a) (West 2010).

¹⁷⁰ 5/5-4.5-50.

¹⁷¹ 5/8-4(c)(4).

¹⁷² Art Barnum, *Woman Pleads Guilty in HIV Case*, CHI. TRIB., Feb. 4, 2003, at 3-D.

¹⁷³ 720 ILL. COMP. STAT. ANN. 5/8-4(b).

despite the fact that the completed act would not have had any risk of HIV exposure (i.e.: a hand job, fingering, or performing oral sex). In 1991, a 34-year old, HIV-positive sex worker was sentenced to three years in prison after she agreed to have sex with an undercover police officer.¹⁷⁴ She was released from prison by the Governor of Illinois shortly before her death.¹⁷⁵

In another case, a 26-year old, allegedly HIV-positive sex worker was arrested and charged with attempted criminal transmission of HIV when she walked up to a police officer and offered to have sex with him for money.¹⁷⁶ In each of these cases it did not matter that there was no evidence to show that even if the proposed act had been completed there would have been a risk of HIV transmission, if disclosure would have occurred, or condoms or other protection would have been used.

There have been repeated unsuccessful legal challenges to the constitutionality of Illinois' criminal HIV transmission law.

Despite its flawed language and broad scope, the Illinois HIV criminal transmission law has survived multiple legal challenges arguing that its language is unconstitutionally vague. In *People v. Dempsey*,¹⁷⁷ a 34-year old, HIV-positive man was convicted of aggravated criminal sexual assault and criminal transmission of HIV when he allegedly ejaculated in the mouth of his 9-year old brother.¹⁷⁸ On appeal, the defendant argued that Illinois' criminal transmission law was unconstitutionally vague, as the phrase "could result in the transmission of HIV" is overbroad and fails to define precisely what conduct is prohibited.¹⁷⁹ He also contended that the Illinois legislature's failure to define "bodily fluid" meant that exposure to saliva and tears could conceivably be criminalized, and an individual interpreting the law would be left to speculate about the legality of activities that pose no risk of transmitting HIV, such as spitting.

The Illinois Appellate Court rejected this challenge, finding that the defendant's conduct fell squarely within the language of Illinois' criminal transmission statute, and that the law was not unconstitutionally vague as applied to him. The court reasoned that the defendant clearly exposed his brother to HIV because semen was well known as a "transmitter of HIV" and oral sex was a recognized route of HIV transmission. Given that the defendant's conduct was clearly targeted under Illinois' HIV transmission statute, the court found that he was given fair notice that his conduct would be considered criminal. The defendant did not have standing to challenge the statute on hypothetical scenarios that were not reflective of his conduct.

In 1994, the Illinois Supreme Court also ruled that the state's transmission law was not unconstitutionally vague.¹⁸⁰ *People v. Russell* concerned two prosecutions for HIV "transmission"¹⁸¹

¹⁷⁴ Rob Karwath, *Prostitute with AIDS Wants Out*, CHI. TRIB., Aug. 29, 1991, at 8-NW.

¹⁷⁵ *Edgar Frees Prostitute with AIDS*, CHI. TRIB., Oct. 23, 1991, at 6-C.

¹⁷⁶ Jeff R. Grandziel, *Woman Charged with Prostitution*, CHI. TRIB., Sept. 23, 1997, at 3-NW.

¹⁷⁷ 610 N.E.2d 208 (Ill. App. Ct. 1993).

¹⁷⁸ *Dempsey*, 610 N.E.2d at 210. The opinion does not indicate that the nine-year-old boy was infected with HIV as a consequence.

¹⁷⁹ *Id.* at 222.

¹⁸⁰ *People v. Russell*, 630 N.E.2d 794 (Ill. 1994).

¹⁸¹ As noted earlier, charges brought under Illinois' HIV exposure statute are called "criminal transmissions," even though no transmission occurred.

that were consolidated into one appeal. In one case, an HIV-positive woman was charged with criminal transmission of HIV when she engaged in consensual sexual intercourse allegedly without disclosing her status to her partner.¹⁸² In the second, an HIV-positive man was charged with the same offense after he raped a woman with knowledge of his HIV status. In both cases, the trial judges found Illinois' criminal transmission law to be unconstitutionally vague.

The Illinois Supreme Court reversed the trial courts decisions finding that the specific conduct of the defendants were clearly addressed by the statute, and that the argument that the Illinois' criminal transmission law "might open the innocent conduct of others to possible prosecution is a matter of pure speculation and conjecture."¹⁸³

Despite the fact that Illinois' HIV "criminal transmission" statute has and continues to lead to numerous prosecutions of conduct that pose only theoretical or remote risks of HIV transmission, provides limited definitions of what conduct could be criminally liable, and does not consider ameliorating factors such as condom use, it has managed to withstand constitutional challenge.

HIV-positive persons are prohibited from donating or providing blood, tissue, semen, organs, or bodily fluids.

HIV-positive persons also are subject to prosecution and imprisonment if they donate blood, bodily fluids such as semen, and human tissue. It is a Class 2 felony, punishable by three to seven years in prison¹⁸⁴ and a \$25,000 fine,¹⁸⁵ for an HIV-positive person to donate, transfer, or provide blood, tissue, semen, organs, or "other potentially infectious bodily fluids" for transfusion, transplant, insemination, or administration to another.¹⁸⁶

The meaning of "potentially infectious bodily fluids" is undefined in the statute. Taken literally, any bodily fluid containing any amount of HIV virus could "potentially" infect another if the odds of HIV transmission are greater than zero. Neither the intent to transmit HIV nor actual transmission is required for liability.

Individuals prosecuted under this statute have a defense if they can prove that the individual exposed to a blood, fluid, organ, or tissue donation (1) was aware that her/his donor was HIV-positive, (2) knew that accepting a donation could result in HIV infection, and (3) consented to HIV exposure knowing of this risk.¹⁸⁷

Individuals with HIV may also be prosecuted for attempting to donate blood, semen, organs or other human tissues, and bodily fluids. Such offenses are Class 3 felonies, punishable by two to five years in prison¹⁸⁸ and a \$25,000 fine.¹⁸⁹ A verbal offer to donate blood, fluids, organs, or other tissues may be sufficient for prosecution.

¹⁸² *Russell*, 630 N.E.2d at 796.

¹⁸³ *Id.* at 796.

¹⁸⁴ 730 ILL. COMP. STAT. ANN. 5/5-4.5-35 (West 2010).

¹⁸⁵ 5/5-4.5-50.

¹⁸⁶ 5/12-16.2(a)(2).

¹⁸⁷ 5/12-6.2(3)(d).

¹⁸⁸ 5/5-4.5-40(a).

¹⁸⁹ 5/5-4.5-50.

HIV-positive persons can be prosecuted and jailed for sharing dirty syringes with others.

Criminal liability, including imprisonment, may result from sharing or exchanging needles and other drug paraphernalia. Specifically, it is a Class 2 felony, punishable by three to seven years in prison¹⁹⁰ and a \$25,000 fine,¹⁹¹ for an HIV-positive person aware of her/his HIV-positive status to dispense, deliver, exchange, sell, or transfer in any other way to another person any non-sterile “intravenous or intramuscular paraphernalia.”¹⁹² This includes syringes, or “any equipment, product, or material of *any* kind which is peculiar to and marketed for use in injecting a substance into the human body.”¹⁹³

HIV-positive persons in Illinois are prohibited from selling, sharing, or exchanging, or otherwise transferring to any other person unsterilized needles or any other unsterilized items used to inject substances into the human body. Simply giving someone a dirty syringe is sufficient for a conviction; neither the intent to transmit HIV nor actual transmission is required.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

¹⁹⁰ 5/5-4.5-35.

¹⁹¹ 5/5-4.5-50.

¹⁹² 5/12-6.2(3).

¹⁹³ 5/12-6.2(3)(b).

Indiana Statute(s) that Allow for Criminal Prosecution based on HIV Status:**IND. CODE ANN. §§ 16-41-7-1, 35-42-1-9*****Carriers' duty to warn persons at risk/Failure of carriers of dangerous communicable diseases to warn persons at risk***

People who know of their HIV status have a duty to warn or cause to be warned by a third party person at risk of the following: the carrier's disease status and the need to seek health care, such as counseling and testing. This statute applies to past and present needle sharing and sexual activity that has been epidemiologically demonstrated to transmit HIV. A person who recklessly violates or fails to comply with this law commits a Class B misdemeanor. A person who knowingly or intentionally violates this state statute commits a Class D felony.

IND. CODE § 35-42-2-6(E)***Battery by body waste (on a law enforcement officer)***

A person who knowingly or intentionally in a rude, insolent, or angry manner places (or coerces another to place) blood or another body fluid or waste on a law enforcement or corrections officer, firefighter, or first responder (identified as such and engaged in performance of official duties) commits a Class D Felony. If the person knew or recklessly failed to know that the blood, bodily fluid or waste was infected with HIV, it is a Class C felony. If the person knew or recklessly failed to know that the blood, bodily fluid, or waste was infected with HIV and the offense results in transmission of HIV, it is a Class A felony.

IND. CODE § 35-42-2-6(F)***Battery by body waste (on another person, non-law enforcement officer)***

A person who knowingly or intentionally in a rude, insolent, or angry manner places human blood, semen, urine or fecal waste on another person commits a Class A misdemeanor. If the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with HIV, it is a Class D felony. If the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with HIV and the offense results in transmission of HIV, it is a Class B felony.

IND. CODE § 35-45-16-2(A) & (B)***Malicious mischief (touching)***

A person who recklessly, knowingly, or intentionally places human blood, semen, urine, or fecal waste in a location with the intent that another person will involuntarily touch it commits malicious mischief, a Class B misdemeanor. If the person knew or recklessly failed to know that the blood, urine, or waste was infected with HIV, it is a Class D felony. If the person knew or recklessly failed to know that the waste was infected with HIV and the offense results in the transmission of HIV to the other person, it is a Class B felony.

IND. CODE § 35-45-16-2(D)***Malicious mischief (ingesting)***

A person who recklessly, knowingly, or intentionally places human blood, body fluid, or fecal waste in a location with the intent that another person will ingest it commits malicious mischief with food, a Class A misdemeanor. If the person knew or recklessly failed to know that the blood, fluid, or waste was infected with HIV, it is a Class D felony. If the person knew or recklessly failed to know that the blood, fluid, or waste was infected with HIV and the offense results in the transmission of HIV to the other person, it is a Class B felony.

IND. CODE § 16-41-14-17***Donation, sale, or transfer of HIV-infected semen***

A person who, for the purpose of artificial insemination, recklessly, knowingly, or intentionally donates, sells, or transfers semen that contains HIV antibodies commits a Class C felony. The offense is a Class A felony if the offense results in the transmission of the virus to another person (this does not apply to a person who transfers for research purposes semen that contains HIV antibodies).

IND. CODE § 35-42-1-7***Transferring contaminated bodily fluids***

A person who recklessly, knowingly, or intentionally donates, sells, or transfers blood, a blood component, or semen for artificial insemination that contains HIV commits a Class C felony, but if it results in the transmission of HIV it is a Class A felony (this does not apply to person who, for reasons of privacy, donates blood to a blood center after the person has notified the blood center that the blood must be disposed of or who transfers HIV-positive body fluids for research purposes).

IND. CODE. § 35-50-2-4 - 7***Penalties (all include the possibility of a \$10,000 fine)***

Class A felony: twenty – fifty years imprisonment

Class B felony: six – twenty years imprisonment

Class C felony: two – eight years imprisonment

Class D felony: six months – three years imprisonment

IND. CODE. 35-50-3-3

Class B misdemeanor: no more than 180 days imprisonment and a \$1000 fine.

HIV-positive persons can face felony charges for failing to disclose their HIV status to their sexual and needle-sharing partners.

Indiana’s “duty to warn” statute requires that HIV-positive persons disclose their status to past, present, and future sexual or needle-sharing partners that have or will engage in activities that have been “demonstrated epidemiologically to transmit” HIV.¹⁹⁴ Such activities include sharing non-sterile needles and engaging in oral, anal, and penile-vaginal sex.¹⁹⁵ It is a Class D felony for a person who knowingly or intentionally fails to disclose her/his HIV status, punishable by up to three years imprisonment and the possibility of a \$10,000 fine.

Neither the intent to transmit nor the transmission of HIV is required.

Though disclosing HIV status is the only affirmative defense to prosecution, condom use may potentially be a successful defense. Condoms, when used consistently and correctly, are highly effective in preventing the transmission of HIV in sexual contact “demonstrated epidemiologically to transmit” the virus. Indiana’s failure to warn statute does not state whether condom use or the use of other protection is a defense to prosecution, but one case has found that for a successful prosecution, the state must prove that (1) the defendant knew she/he was HIV-positive, (2) engaged in *unprotected* sex, and (3) failed to disclose her/his HIV status during the sexual conduct.¹⁹⁶ Other cases that have been prosecuted under the failure to warn statute have typically involved HIV-positive persons who engaged in unprotected sex with their partners.¹⁹⁷ Though there is limited case law on whether condom use provides a successful defense, the application of the statute appears to be limited to cases where no condom or other form of protection was used.

¹⁹⁴ IND. CODE. § 16-41-7-1 (b)-(c) (2006).

¹⁹⁵ Johnson v. State, 785 N.E.2d 1134 (Ind. Ct. App. 2003).

¹⁹⁶ Johnson, 785 N.E.2d at 1145 n.1.

¹⁹⁷ See Sophia Voravong, *Teen Charged in Suspected HIV Lie*, JOURNAL & COURIER, June 10, 2010 (page unavailable); Ruth Anne Krause, *Gary Slaying Suspect has HIV, Cops Say*, MORRILLVILLE POST TRIBUNAL, Nov. 5, 1999, at 4; *AIDS Victim Charged for Having Unprotected Sex*, FORT-WAYNE SENTINEL, Sept. 11, 1998, at 5A.

Other cases and prosecutions in Indiana of HIV-positive persons failing to warn their partners include:

- In June 2010, a 19-year-old woman was charged with failing to disclose her HIV status to her sexual partner, a 22-year-old man that she had met on the social networking site, MySpace.¹⁹⁸ The two engaged in unprotected sex on numerous occasions.
- In March 2010, a man pleaded guilty to two counts of failing to warn his sexual partners that he was HIV-positive.¹⁹⁹ Following his guilty plea, he was charged with, and pleaded not guilty to, fifteen additional counts of failing to tell his sexual partners about his status.²⁰⁰
- A man charged with two counts of failing to disclose his HIV status to his sexual partners was sentenced to three years of probation and a suspended one-and-a-half-year prison sentence.²⁰¹
- A 27-year-old woman was charged with failing to warn her sexual partner, with whom she had engaged in unprotected sex, that she was HIV-positive.²⁰²
- An HIV-positive man was charged with failing to tell his girlfriend that he was HIV-positive.²⁰³ They had been having unprotected sex for four months.
- A 47-year-old, HIV-positive man was charged with failing to warn his sexual partner that he was HIV-positive.²⁰⁴

It is a felony for HIV-positive persons to expose others to any bodily fluid, including those not known to transmit HIV.

In Indiana, there are multiple statutes that make it a felony to expose others to blood, semen, saliva, feces, and urine that are “infected with HIV.” This law applies to a wide range of acts and bodily fluids that are not means of transmitting HIV, including spitting saliva or throwing urine and feces.

Under Indiana’s battery by body waste statutes, it is a Class C felony punishable by up to eight years imprisonment if an HIV-positive person intentionally or knowingly in a rude, insolent, or angry manner places blood, bodily fluid (including tears, saliva, and nasal secretions²⁰⁵), or waste on a law enforcement officer, corrections officer, firefighter, or first responder.²⁰⁶ It is a Class A felony if the exposure results in transmission. The same statute applies when a person intentionally causes another person, who is not a law enforcement officer or first responder, to come in contact with bodily fluids “infected with HIV,” but the penalties are less severe.²⁰⁷ To be prosecuted under this statute, it is only necessary that the bodily fluid make some sort of contact with another’s skin or

¹⁹⁸ Sophia Voravong, *Teen Charged in Suspected HIV Lie*, JOURNAL & COURIER, June 10, 2010 (page unavailable).

¹⁹⁹ *Charges Mount in HIV-warning Case*, FORT WAYNE JOURNAL GAZETTE, March 17, 2010, at 3C.

²⁰⁰ *Man Pleads Not Guilty in AIDS Warning Case*, INDIANAPOLIS STAR, March 26, 2010, at A24.

²⁰¹ Rebecca Green, *Probation Given to Man Who “Hid” HIV*, FORT WAYNE JOURNAL GAZETTE, July 8, 2004, at 2.

²⁰² *AIDS Victim Charged for Having Unprotected Sex*, *supra* note 213.

²⁰³ Ruth Anne Krause, *Gary Slaying Suspect has HIV, Cops Say*, MORRILLVILLE POST TRIBUNAL, Nov. 5, 1999, at 4.

²⁰⁴ *Sex Partner Alleges No HIV Warning*, FORT WAYNE JOURNAL GAZETTE, Oct. 26, 2007, at 2C.

²⁰⁵ *Newman v. State*, 677 N.E.2d 590 (Ind. Ct. App. 1997)(defendant prosecuted under the battery by body waste statute for exposing officers to her tears, saliva, and nasal secretions).

²⁰⁶ IND. CODE § 35-42-2-6(E) (West 2010).

²⁰⁷ § 35-42-2-6(F).

clothing.²⁰⁸

It is also a felony under the malicious mischief statute to recklessly, knowingly, or intentionally place bodily fluids (including blood, semen, urine, or feces) with the intent that another person might unintentionally touch or eat them.²⁰⁹ The penalties increase if the person knew the bodily fluids contained HIV or if HIV transmission occurs as a result.

The battery by body waste and malicious mischief statutes provide increased penalties if the bodily fluids in question contain traces of HIV despite the fact that HIV transmission may be impossible under the circumstances. These statutes fail to recognize that urine, feces, and saliva do not transmit HIV, and throwing, spitting, or placing these fluids on another person has never been shown to result in HIV transmission. There have been prosecutions under these statutes involving HIV-positive defendants exposing others to saliva or fecal waste.²¹⁰ For example, in *Nash v. State*, the HIV-positive defendant was sentenced to six years imprisonment under the battery by body waste statute for throwing his urine and feces on a nurse in his detention facility.²¹¹ The urine and feces landed on the nurse's shoes and box that she was carrying. Despite the fact that there was no risk of HIV transmission, the court sentenced him under the more severe Class C felony charge for exposing the nurse to bodily fluid "infected with HIV."²¹² In these cases, though there is no risk of HIV transmission, HIV-positive persons face increased penalties solely due to their HIV status.

There is only one case on record that challenges the battery by body waste statute. In *Newman v. State*, an HIV-positive sex worker was charged under the Class C felony of purposefully placing her "HIV-infected" body fluids on law enforcement officers who were trying to arrest her. The defendant "swung her head back and forth in an attempt to spray the officers with her tears, saliva, and nasal secretions."²¹³ The trial judge refused to enter the conviction as a Class C felony and instead convicted her under the lesser included Class D felony offense reasoning that "it's medically impossible to transfer HIV and AIDS through spitting."²¹⁴ The defendant was sentenced to three years for battery by body waste. If she had been convicted under the original charges she would have been sentenced to a maximum of eight years imprisonment. Despite the trial court's scientifically sound approach to the facts of the case, the Indiana Court of Appeals disagreed with the trial court's ruling but did not address the sentencing because the State did not raise the issue on appeal.

In a 2002 case, a 37-year-old, HIV-positive homeless man was charged with battery by bodily waste after he allegedly spat on a confinement officer.²¹⁵ He was in custody for car-jacking, resisting arrest, and battery. Prior to the spitting incident, he had been charged under the same statute for throwing

²⁰⁸ *Thomas v. State*, 749 N.E.2d 1231 (Ind. Ct. App. 2001) (holding that the statute was not ambiguous and affirming conviction when fluid landed on body of person, because legislature intended to penalize the mere "offensive" and "disgusting" nature of such contact).

²⁰⁹ IND. CODE § 35-45-16-2(A)-(D) (West 2010).

²¹⁰ See *Newman*, 677 N.E.2d at 593; *HIV-positive man Charged With Spitting on Officer*, FORT WAYNE SENTINEL, June 11, 2002, at 4A.

²¹¹ 881 N.E.2d 1060 (Ind. Ct. App. 2008).

²¹² *Id.* at 1062.

²¹³ *Newman*, 677 N.E.2d at 593.

²¹⁴ *Id.*

²¹⁵ *HIV-positive Man Charged With Spitting on Officer*, FORT WAYNE SENTINEL, June 11, 2002, at 4A.

a cup of urine on another officer.

It is a felony for HIV-positive persons to donate or sell their semen, blood, or plasma.

It is a Class C felony, punishable by two to eight years in prison and a fine of not more than \$10,000 fine for a person to donate or sell blood, blood products, or semen that contains HIV.²¹⁶ The law does not apply to people who donate semen or blood for research purposes or notify the blood center that the blood or blood component must be discarded and not used for any purpose. It is a Class A felony if the act results in transmission of HIV, which is punishable by twenty to fifty years in prison.

There have been numerous cases of individuals being prosecuted under Indiana's transfer and donating contaminated fluids statutes:

- In 2010, a 39-year-old woman, who tested positive for HIV in 2005, pleaded not guilty to donating her plasma.²¹⁷
- In 2004, a HIV-positive man pleaded guilty and was sentenced to four years imprisonment for selling his plasma.²¹⁸
- A 20-year-old, HIV-positive homeless woman was sentenced to two years of probation for selling her plasma.²¹⁹ She received \$20 for her donation and testified that she was going to use the money to feed herself and her baby.
- A 46-year-old, HIV-positive man was sentenced to two years imprisonment for selling his blood at a blood plasma donation site.²²⁰
- In 2003, five HIV-positive persons were charged with multiple counts of transferring contaminated fluids for selling their plasma.²²¹

HIV-positive individuals have also been charged under general criminal laws.²²²

In *State v. Haines*²²³, the HIV-positive defendant attempted suicide by slashing his wrists, but was interrupted by police and emergency medical technicians. When the police and emergency team arrived, Haines began yelling at them not to come closer or else he would infect them with HIV. He

²¹⁶ IND. CODE §§ 35-42-1-7, 16-41-14-17 (West 2010).

²¹⁷ *Tainted Plasma: Woman Pleads Not Guilty to Donating Tainted Plasma*, FOX59.COM, Mar. 9, 2010, <http://www.fox59.com/news/wxin-tainted-plasma-030910,0,2095819.story>.

²¹⁸ *Man Sentenced in Sale of HIV-tainted Plasma*, INDIANAPOLIS STAR, June 26, 2004, at B2.

²¹⁹ *Woman Given Probation for Selling Tainted Plasma*, INDIANAPOLIS STAR, Nov. 6, 2003, at B1.

²²⁰ *Sale of Tainted Blood Nets HIV-positive Man 2 Years*, MERRILLVILLE POST TRIBUNE, April 21, 2007, (A5).

²²¹ *Five with HIV Accused of Selling Plasma*, INDIANAPOLIS STAR, July 18, 2003, at A1.

²²² In *White v. State*, 647 N.E.2d 684 (Ind. Ct. App. 1995), the court found that HIV could not be considered an aggravating factor during the sentencing of a crime, in this case child molestation, where the record contains no evidence that the defendant was HIV-positive, knew he was HIV-positive, or had received risk counseling.

²²³ 545 N.E.2d 834 (Ind. Ct. App. 1989). It should be noted that Indiana's battery by body waste statute was adopted after this case.

began to scratch, bite, spit at, and throw blood at the officers. Haines was convicted of three counts of attempted murder, but the trial judge vacated the conviction because the state did not prove that HIV could be spread by the defendant's conduct.

On appeal, the court reinstated the attempted murder conviction because the defendant was HIV-positive, knew of his status, and intended to infect others with HIV by spitting, biting, scratching, and throwing blood. The court likened the defendant's actions as "biological warfare [...] akin to a sinking ship firing on his rescuers"²²⁴ and found that, even if the conduct in question couldn't result in HIV infection, the defendant still believed that his conduct could result in HIV transmission.

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²²⁴ *Id.* at 838.

Iowa Statute(s) that Allow for Criminal Prosecution based on HIV Status:**IOWA CODE § 709C.1*****Class B Felony: Criminal transmission of HIV***

A person commits criminal transmission of HIV if the person, knowing of her/his HIV-positive status:

1. Engages in intimate contact with another person;
2. Transfers, donates, or provides the person's blood, tissue, semen, organs, or other potentially infectious bodily fluids for transfusion, transplantation, insemination, or other administration to another person; or
3. Dispenses, delivers, exchanges, sells, or in any other way transfers to another person any nonsterile intravenous or intramuscular drug paraphernalia previously used by the person infected with HIV.

“Intimate contact” is the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of HIV.

Actual transmission of HIV is not a necessary element of this crime.

It is an affirmative defense that the person exposed to HIV (1) knew of the other person's HIV-positive status, (2) knew that the action of exposure could result in transmission of HIV, and (3) consented to exposure with that knowledge.

IOWA CODE § 902.9***Maximum sentence for felons***

A Class B felony shall be confined for no more than twenty-five years.

Failure to disclose HIV status before sexual activities may result in prosecution.

Individuals with HIV in Iowa should be aware that a broad range of sexual activities may result in prosecution and imprisonment under the state's “criminal transmission” laws. The language of Iowa's HIV exposure statute is nearly identical to the criminal transmission laws of Illinois (See Illinois). Also, though Iowa's statute is called “criminal transmission of HIV,” neither the intent nor actual transmission of HIV are required for prosecution.

In Iowa, it is a Class B felony, punishable by up to twenty-five years in prison,²²⁵ for a person who is aware that she/he is HIV-positive to engage in “intimate contact” with another.²²⁶ Sex offender registration is also required.²²⁷

“Intimate contact” is defined as the intentional exposure of the body of one person to a bodily fluid of another person in a manner that *could* result in the transmission of HIV.²²⁸ The use of condoms or other protection during sexual intercourse is not a statutory defense to prosecution without disclosure of one’s HIV status.

In Iowa’s first prosecution for criminal transmission of HIV, a 46-year old, HIV-positive man was sentenced to twenty-five years in prison after he engaged in anal and oral sex with an 11-year-old boy. The boy reportedly told the police that he knew of the defendant’s HIV-positive status.²²⁹ However, because he was under the age of consent, the boy’s consent to HIV exposure was not considered valid.

Like its Illinois counterpart, Iowa’s “criminal transmission” law has survived legal challenges arguing that it is unconstitutionally vague. In *State v. Keene*,²³⁰ an HIV-positive man was charged with criminal transmission of HIV after engaging in unprotected sexual intercourse with a female partner without disclosing his HIV status. It is not known whether he ejaculated or if the woman tested positive for HIV,²³¹ nor are those factors relevant in a prosecution under the statute. After pleading guilty, the defendant in *Keene* received a twenty-five-year prison sentence.

Following his guilty plea, the defendant argued on appeal that Iowa’s criminal transmission laws were unconstitutionally vague as applied to his case. Specifically, he argued that the language “could result in the transmission of HIV” failed to give him fair notice of what conduct was prohibited under Iowa’s HIV exposure laws. The Supreme Court of Iowa disagreed, holding that conviction under Iowa’s criminal transmission law was lawful as long as HIV transmission was *possible* and “any reasonably intelligent person is aware it is possible to transmit HIV during sexual intercourse, especially when it is unprotected.”²³²

In *Keene*, the Supreme Court of Iowa also clarified the types of “intimate contact” that may result in prosecution, recognizing that “HIV may be transmitted through contact with an infected individual’s blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing [HIV].”²³³

²²⁵ IOWA CODE ANN. § 902.9(2) (West 2010).

²²⁶ § 709C.1(1)(a).

²²⁷ § 692A.102(1)(c)(22).

²²⁸ § 709C.1(2)(b).

²²⁹ *Man Imprisoned for 25 Years Under New Iowa Exposure Law*, 14 AIDS POL’Y & L. 3, Feb. 19, 1999.

²³⁰ 629 N.W.2d 360, 362 (Iowa 2001).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 363.

Another case, *State v. Stevens*,²³⁴ following *Keene*, held that an HIV-positive individual may be prosecuted under Iowa's criminal transmission laws if she/he engages in oral sex. In *Stevens*, an HIV-positive man was sentenced to twenty-five years in prison for criminal transmission of HIV when he engaged in oral sex with a 15-year-old boy and ejaculated in the boy's mouth. He also received a ten-year sentence for sexual abuse of a child. Notably, the court in *Stevens* interpreted the definition of "sexual intercourse" in *Keene* to include oral sex, holding that "oral sex is a well-recognized means of transmission of the HIV."²³⁵

As interpreted by various court decisions, Iowa's criminal transmission laws, "intimate contact" language includes anal sex,²³⁶ penile-vaginal sex, and oral sex.

Individuals living with HIV should also note that a conviction for HIV exposure may not require ejaculation, even though Iowa's definition of "intimate contact" requires exposure to bodily fluids. In *Keene*, the Supreme Court of Iowa determined that the question of whether the defendant ejaculated during intercourse was irrelevant as long as he exposed another to his bodily fluids.²³⁷ In 2002, an HIV-positive man engaged in unprotected, undisclosed sex three times with a female partner and was convicted and sentenced to twenty-five years in prison. In his appeal, *State v. Musser*,²³⁸ the defendant argued that he did not expose the woman to bodily fluids because he did not ejaculate. A state health director testified at trial that HIV transmission was possible during sexual intercourse without ejaculation, and the defendant's conviction was affirmed.²³⁹

In a different appeal involving the defendant in *Musser*, Iowa's Supreme Court rejected another challenge that Iowa's criminal transmission law was unconstitutionally vague.²⁴⁰ As applied to the defendant's case, the law gave clear warning, and the court took judicial notice, that HIV could be transmitted through sexual intercourse and such activities fell under the purview of the statute. The court found that requiring an HIV-positive person to disclose her/his HIV status was the most narrowly tailored means of achieving the goal of the statute, to limit the spread of HIV, and that such a requirement did not infringe on First Amendment rights.

The court also rejected the defendant's claim that Iowa's criminal transmission law is vague on its face. Musser argued that the statute, as written, would limit his freedom of association because its broad language could limit conduct such as kissing or "sweating on another while playing a game of basketball."²⁴¹ The court rejected this argument because such activities are not known to transmit HIV, and the statute only addresses conduct that could result in HIV transmission. Common knowledge dictated that HIV could be transmitted from contact with blood, semen, or vaginal fluid, and a separate Iowa statute defined "infectious bodily fluids" as "bodily fluids capable of transmitting HIV infection as determined by the [C]enters for [D]isease [C]ontrol and

²³⁴ 719 N.W.2d 547 (Iowa 2006).

²³⁵ *Id.* at 551.

²³⁶ *Man Imprisoned for 25 Years Under New Iowa Exposure Law*, 14 AIDS POL'Y & L. 3, Feb. 19, 1999.

²³⁷ *Keene*, 629 N.W.2d at 366.

²³⁸ 721 N.W.2d 758, 759-62. (Iowa 2006).

²³⁹ *Musser*, 721 N.W.2d at 761.

²⁴⁰ *State v. Musser*, 721 N.W.2d 734 (Iowa 2006).

²⁴¹ *Id.* at 746.

[P]revention.”²⁴² This means that exposure to saliva, tears, sweat, and other bodily fluids that have not been identified by the CDC as transmitting HIV would not be a violation of this statute.

An individual prosecuted under the criminal transmission laws of Iowa may have a defense that will prevent conviction if she/he can prove that the person exposed to HIV (1) knew that she/he was HIV-positive, (2) was aware that the exposure could result in the transmission of HIV, and (3) consented to HIV exposure with this knowledge of the risks.²⁴³ It is a defense if HIV status is disclosed to sexual partners, although proving disclosure may be difficult in many cases and the evidence is limited to the testimonies of the parties. In *Musser*, for example, the defendant testified that his sexual partner knew of his HIV-positive status,²⁴⁴ but the jury chose to believe the testimony of the complainant.

According to one report, there have been at least thirty-six arrests and twenty-four convictions under Iowa’s statute.²⁴⁵ The following Iowa cases serve as other examples of prosecutions that have resulted from failing to disclose HIV-positive status to sexual partners:

- In April 2009, a gay man in Iowa was sentenced to twenty-five years in prison after he failed to disclose his HIV status to a one-time sexual partner he met online.²⁴⁶ The man was also required to register as a sex offender and undergo a sex offender treatment program. His sentence was later reduced to five years probation and mandatory sex offender registration.
- In December 2009, a 38-year-old, HIV-positive man was charged with criminal transmission for failing to tell his sexual partners that he was HIV-positive..²⁴⁷

HIV-positive persons are prohibited from donating or providing blood, human tissue, semen, organs, or bodily fluids.

In Iowa, it is a Class B felony, punishable by up to twenty-five years in prison,²⁴⁸ for an HIV-positive person who is aware of her/his HIV status to donate, transfer, or provide blood, tissue, semen, organs, or “other potentially infectious bodily fluids” for transfusion, transplant, insemination, or administration to another.²⁴⁹ Neither the intent to transmit HIV nor actual transmission is required for prosecution.²⁵⁰

²⁴² *Id.*

²⁴³ IOWA CODE ANN. § 709C.1(5) (West 2010).

²⁴⁴ *Musser*, 721 N.W.2d at 760.

²⁴⁵ Lynda Waddington, *Iowa Courts Stand Firm on HIV Transmission Law*, THE IOWA INDEPENDENT, July 1, 2009, available at <http://iowaindependent.com/16621/iowa-courts-stand-firm-on-hiv-transmission-law>. Please note that these cases were not documented within the report, and the authors were not able to confirm the numbers provided in the article.

²⁴⁶ Arthur Breur, *Nick Rhoades 25-year Sentence Cut Short, But He’s Hardly a Free Man*, ACCESSLINE IOWA, Sept. 14, 2009, http://accesslineiowa.com/index.php?option=com_content&view=article&id=151:nick-rhoades-25-year-sentence-cut-short-but-hes-hardly-a-free-man&catid=92:editorials&Itemid=59.

²⁴⁷ Jeff Reinitz, *Waterloo Man Arrested for Transmission of HIV*, WCF COURIER, Dec. 16, 2009, http://wcfcourier.com/news/local/article_747c123c-ea73-11de-8816-001cc4c002e0.html.

²⁴⁸ IOWA CODE ANN. § 902.9(2) (West 2010).

²⁴⁹ § 709C.1(1)(b).

²⁵⁰ § 709C.1(4).

HIV-positive persons are prohibited from sharing needles and syringes with others.

Iowa specifically targets HIV-positive drug users who share or exchange their needles and syringes. Specifically, it is a Class B felony, punishable by up to twenty-five years in prison,²⁵¹ for an HIV-positive person aware of his/her HIV-positive status to dispense, deliver, exchange, sell, or transfer in any other way to another any non-sterile “intravenous or intramuscular paraphernalia” that she/he has previously used.²⁵²

Such paraphernalia includes needles, syringes, or any other “equipment, product, or material of *any* kind which is peculiar to and marketed for use in injecting a substance into the human body.”²⁵³ Neither the intent to transmit HIV nor actual transmission is required.²⁵⁴

An HIV-positive individual prosecuted under this statute may have a defense that will prevent conviction if she/he can prove that the individual exposed to unsterilized drug paraphernalia (1) was aware that she/he was HIV-positive, (2) knew that using unsterilized drug paraphernalia could result in HIV infection, and (3) consented to HIV exposure knowing of this risk.²⁵⁵

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

²⁵¹ § 902.9(2)(West 2010).

²⁵² § 709C.1(1)(c).

²⁵³ § 709C.1(2)(c).

²⁵⁴ § 709C.1(4).

²⁵⁵ § 709C.1(5).

Kansas Statute(s) that Allow for Criminal Prosecution based on HIV Status:**2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668, New Sec. 59)******Severity Level 7, Person Felony: intentional exposure to life threatening disease***

It is unlawful for a person who knows oneself to be infected with a life threatening communicable disease, to:

1. Engage in sexual intercourse or sodomy with another individual with the intent to expose that individual to that life threatening communicable disease;
2. Sell or donate one's own blood, blood products, semen, tissue, organs, or other body fluids with the intent to expose the recipient to a life threatening communicable disease; or
3. Share with another individual a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from, the other individual's body with the intent to expose another person to a life threatening communicable disease.

Violation of this section is a severity level 7, person felony.**

"Sexual intercourse" shall not include penetration by any object other than the male sex organ.

"Sodomy" shall not include penetration of the anal opening by any object other than the male sex organ.

* Re-codification of KAN. CRIM. CODE. ANN. § 21-3435 (West 2010).

** See Kansas Sentencing Guidelines, available at http://www.sedgwickcounty.org/da/sentencing_grid.html.

Engaging in penile-vaginal sex or anal sex with the specific intent to transmit HIV is a felony.

It is a severity level 7, person felony punishable by up to twenty-six months in prison²⁵⁶ for a person who knows that she/he is infected with a "life threatening communicable disease" to (1) engage in

²⁵⁶ See KAN. SENTENCING GUIDELINES app. B (2009), available at <http://www.accesskansas.org/ksc/2009desk.shtml>.

sexual intercourse or sodomy (2) with the intent to expose another to the disease.²⁵⁷ Although “life threatening communicable disease” is not defined, HIV appears to be included, as at least one HIV-positive person in Kansas has been charged for HIV exposure under this statute.²⁵⁸

Under Kansas’s exposure laws, “sexual intercourse” only includes penetration by the penis.²⁵⁹ Because even the slightest insertion of the penis into the vagina can be considered “penetration,” ejaculation or the emission of bodily fluids are not required for prosecution.²⁶⁰ Under the terms of this exposure statute, “sodomy” is limited to anal penetration by nothing other than the penis.²⁶¹ Oral sex is not prosecuted under this statute.

In the 2009 case *State v. Richardson*,²⁶² an HIV-positive man appealed his conviction of two counts of exposing another to a life-threatening disease. He was convicted after having sex with two women at a time when his viral load measured as undetectable. At trial and on appeal, the defendant argued that Kansas’ communicable disease exposure law fails to give adequate notice as to what constitutes a “life threatening” disease, “exposure” to HIV, and what viral load would be sufficient for a criminal exposure to HIV. The Supreme Court of Kansas rejected these arguments, stating that the law does not criminalize communicable disease exposure *per se*, but rather sexual intercourse or sodomy with the *intent* to expose another to a communicable disease. It added, “One need not ruminate on exactly how the act must be performed to meet the legal definition of ‘expose’ or even know that a transmittal of the disease is possible.”²⁶³

Importantly, the *Richardson* court also ruled that Kansas’ communicable disease exposure statute required that a defendant have the *specific intent* to expose sexual partners to HIV. It was not sufficient if a defendant had the *general intent* to engage in sexual intercourse while HIV-positive. In doing so, the court rejected the prosecution’s argument that Kansas’ communicable disease exposure law criminalized *any* act of sexual intercourse or sodomy by an HIV-positive person, even if a condom was used. The prosecution went as far as to suggest that complete abstinence from sex is the only way to avoid exposing others to a risk of HIV. The Kansas Supreme Court disagreed and vacated the man’s conviction after the state failed to prove that his specific intent was to expose his sexual partners to HIV.

The court found that the elements of specific intent could include an analysis of whether the HIV-positive person disclosed her/his HIV status, used a condom during sexual acts, or specifically denied having HIV or sexually transmitted diseases.²⁶⁴ Without taking into account such elements the prosecution cannot prove specific intent.

²⁵⁷ 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (*See* New Sec. 59(a)(1), repealing and re-codifying KAN. CRIM. CODE ANN. § 21-3435(a)(1) (West 2010)).

²⁵⁸ *State v. Richardson*, 209 P.3d 696 (Kan. 2009).

²⁵⁹ 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (*See* New Sec. 59(c)(1), repealing and re-codifying KAN. CRIM. CODE ANN. § 21-3435(b) (West 2010)).

²⁶⁰ *See, e.g.* KAN. CRIM. CODE ANN. § 21-3501(1) (defining “sexual intercourse” as any act of penetration, however slight).

²⁶¹ 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (*See* New Sec. 59(c)(2), repealing and re-codifying KAN. CRIM. CODE ANN. § 21-3435(b)).

²⁶² 209 P.3d 696 (Kan. 2009).

²⁶³ *Id.*

²⁶⁴ *Id.* at 704.

HIV-positive persons are prohibited from donating blood, blood products, semen, human tissue, organs, or body fluids.

In Kansas, it is a severity level 7, person felony, punishable by up to twenty-six months in prison,²⁶⁵ for a person who knows that she/he is infected with a “life threatening communicable disease” to (1) sell or donate blood, blood products (plasma, platelets, etc.), semen, tissue, organs, or other body fluids (2) with the intent to expose the recipient to the disease.²⁶⁶

HIV-positive persons are prohibited from sharing needles or syringes.

In Kansas, it is also a severity level 7, person felony, punishable by up to twenty-six months in prison²⁶⁷ for a person who knows that she/he is infected with a “life threatening communicable disease” to share a hypodermic needle and/or syringe with another for (1) the introduction of drugs or any other substance, or (2) the withdrawal of body fluids from that person’s body.²⁶⁸ Intent to expose another to HIV is also required for conviction.

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²⁶⁵ See Kansas Sentencing Guidelines, http://www.sedgwickcounty.org/da/sentencing_grid.html.

²⁶⁶ 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (See New Sec. 59(a)(2), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(a)(2) (West 2010)).

²⁶⁷ See Kansas Sentencing Guidelines, http://www.sedgwickcounty.org/da/sentencing_grid.html.

²⁶⁸ 2010 Kan. Sess. Laws Ch. 136 (H.B. No. 2668) (See New Sec. 59(a)(3), repealing and re-codifying KAN. CRIM. CODE. ANN. § 21-3435(a)(3) (West 2010)).

Kentucky Statute(s) that Allow for Criminal Prosecution based on HIV Status:**KY. REV. STAT. ANN. § 311.990(24)(B)*****Donation of human organs, skin, and other tissues***

Any person infected with HIV knowing that she/he is infected and having been informed of the possibility of communicating the infection by donating human organs, skin, or other human tissues who donates organs, skin or other human tissue is guilty of a Class D felony.

KY. REV. STAT. ANN. §§ 529.090(3)-(4)***Prostitution with knowledge of HIV-positive status***

Any person who commits, offers, or agrees to commit prostitution by engaging in sexual activity in a manner likely to transmit the human immunodeficiency virus and who, prior to the commission of the crime, had tested positive for human immunodeficiency virus and knew or had been informed that she/he had tested positive for human immunodeficiency virus and that she/he could possibly communicate the disease to another person through sexual activity is guilty of a Class D felony.

A person may be convicted and sentenced separately for a violation of this subsection and for the underlying crime of prostitution.

KY. REV. STAT. ANN. § 532.060(2)(D)***Sentence of imprisonment for felony***

For a Class D felony, not less than one year nor more than five years.

KY. REV. STAT. ANN. § 534.030(1)***Fines for felonies***

Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon her/him, be sentenced to pay a fine in an amount not less \$1,000 and not greater than \$10,000 or double her/his gain from commission of the offense, whichever is the greater.

HIV-positive persons are prohibited from donating organs, skin, or other human tissues.

It is a Class D felony, punishable by one to five years in prison²⁶⁹ and a \$1,000- \$10,000 fine²⁷⁰ for a person who (1) knows that she/he is HIV-positive and (2) has been informed that she/he may transmit HIV through organ, skin, or tissue donations to provide any such donations.²⁷¹ Neither the intent to transmit HIV nor infection of another are required for conviction, and prosecution is possible regardless of whether an HIV-positive donor is paid.

Engaging in prostitution or solicitation while HIV-positive is a felony.

It is a Class D felony, punishable by one to five years in prison²⁷² and a \$1,000- \$10,000 fine,²⁷³ if an HIV person (1) knows or has been informed that she/he has tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) commits, offers, or agrees to commit prostitution by engaging in sexual activity “in a manner likely to transmit HIV.”²⁷⁴ Neither the intent to transmit HIV nor actual transmission is required for conviction. Disclosing HIV status to sexual partners nor the use of protection are defenses to prosecution.

Kentucky’s prostitution laws penalize individuals for being HIV-positive, regardless of whether they engage or plan to engage in activities that expose others to a significant risk or any risk of HIV infection. Under the terms of this statute, “prostitution” is defined as engaging, agreeing to engage, or offering to engage in “sexual conduct” in return for a fee.²⁷⁵ “Sexual conduct” is defined as “sexual intercourse or any act of sexual gratification involving the sex organs.”²⁷⁶

It is also a Class D felony, punishable by one to five years in prison²⁷⁷ and a \$1,000- \$10,000 fine,²⁷⁸ if an HIV-positive person (1) knows or has been informed that she/he has tested positive for HIV, (2) is aware or has been informed that HIV can be transmitted through sexual activities, and (3) procures another to commit prostitution.²⁷⁹ Procurement laws often punish “pimping” as opposed to solicitation of prostitution, but this provision is presumably a solicitation law targeting HIV-positive persons who seek out or hire sex workers.

HIV-positive individuals have been prosecuted under Kentucky’s general criminal laws.

Kentucky has used general criminal laws to prosecute HIV-positive individuals for transmitting HIV, failing to disclose HIV status to sexual partners, or otherwise exposing others to HIV infection. These prosecutions often disregard whether HIV-positive defendants actually exposed

²⁶⁹ KY. REV. STAT. ANN. § 532.060(2)(d) (West 2010).

²⁷⁰ § 534.030(1).

²⁷¹ § 311.990(24)(b).

²⁷² § 532.060(2)(d).

²⁷³ § 534.030(1).

²⁷⁴ § 529.090(3).

²⁷⁵ § 529.020(1).

²⁷⁶ § 529.010(9).

²⁷⁷ § 532.060(2)(d).

²⁷⁸ § 534.030(1).

²⁷⁹ § 529.090(4).

others to a significant risk of HIV infection or if there was even a scientific possibility that HIV could be transmitted.

Kentucky's "wanton endangerment" law is one example of a general criminal law that has been used to prosecute HIV-positive persons for alleged HIV exposure. In Kentucky, the crime of first-degree wanton endangerment, punishable by one to five years in prison²⁸⁰ and a \$1,000- \$10,000 fine,²⁸¹ requires than an individual wantonly engage in "conduct which creates a substantial danger of death or serious physical injury to another person."²⁸²

In *Hancock v. Commonwealth*,²⁸³ Kentucky's first case determining whether HIV exposure could be prosecuted under the state's wanton endangerment laws, an HIV-positive man had a two-year sexual relationship with a woman, allegedly without disclosing his HIV-positive status. Although the man testified that his partner knew he was HIV-positive, he later pleaded guilty to second-degree wanton endangerment. He received a 120-day suspended sentence plus one year of probation.

On appeal of the initial indictment, the Court of Appeals of Kentucky rejected the argument that Kentucky's wanton endangerment statute could not apply to HIV exposure, finding the charge valid on its face "in light of the deadly nature of HIV."²⁸⁴ The court also found that the defendant's contention that his partner knew of his HIV-positive status had no bearing on the issue of whether his charges should have been dismissed. That was an issue of fact the man would have to raise before the jury as a defense to prosecution.

Neither the intent to transmit HIV nor actual transmission is required for prosecution for wanton endangerment. Because the defendant in *Hancock* pleaded guilty, there is no jurisprudence on how condoms or other protection during sexual intercourse or evidence of a defendant's low viral load would factor into a prosecution for wanton endangerment, although it certainly could be argued that those factors reduce the risk to below that of the statutory "substantial danger" standard.

In another case, in 2008 a 29-year old, HIV-positive woman was charged with attempted murder when she allegedly bit a store clerk on the chest during a robbery, and then shouted that she had AIDS.²⁸⁵ She later pleaded guilty to first-degree robbery and first-degree wanton endangerment and was sentenced to twelve years imprisonment. The store clerk tested negative for HIV. Two years of her prison sentence arose from the endangerment charge based solely on her HIV-positive status, despite the fact the CDC has concluded that there is only a "remote" possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including "severe trauma, extensive tissue damage, and the presence of blood."²⁸⁶

²⁸⁰ § 532.060(2)(d).

²⁸¹ § 534.030(1).

²⁸² § 508.060(1).

²⁸³ 998 S.W.2d 486, 497 (Ky. Ct. App. 1998).

²⁸⁴ *Id.* at 498.

²⁸⁵ *HIV-Positive Robber Receives 12-year Prison Sentence*, WKYT.V.COM, April 8, 2008, available at <http://www.wkyt.com/home/headlines/17382524.html>; Greg Kocher, *Accused Robber, Biter has HIV*, LEXINGTON HERALD-LEADER, Sept. 13, 2007, at D1.

²⁸⁶ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

Another case in Kentucky involved HIV-positive status as a factor during sentencing for sexual assault. In *Torrence v. Commonwealth*,²⁸⁷ an HIV-positive man found guilty of first-degree rape and sodomy argued that it would violate his due process rights to introduce evidence of his HIV status during the sentencing phase of his trial. At trial, the assault complainant testified that she learned of the defendant's HIV-positive status following the rape, took medication to prevent infection, and suffered emotional damage due to her fears of HIV infection and alleged feelings of alienation from her family. The Supreme Court of Kentucky found no error in admitting this evidence during sentencing, as it directly related to physical and psychological harm the victim suffered, and the impact of a crime on a victim is consideration during sentencing. The court also noted that the defendant's HIV-positive status magnified his victim's suffering beyond that of a "typical" rape victim.

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²⁸⁷ 269 S.W.3d 842 (Ky. 2008).

Louisiana Statute(s)²⁸⁸ that Allow for Criminal Prosecution based on HIV Status:**LA. REV. STAT. ANN. § 14:43.5*****Intentional exposure to AIDS virus***

- A. No person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim.
- B. No person shall intentionally expose another to any acquired immunodeficiency syndrome (AIDS) virus through any means or contact without the knowing and lawful consent of the victim.
- C. No person shall intentionally expose a police officer to any AIDS virus through any means or contact without the knowing and lawful consent of the police officer when the offender has reasonable grounds to believe the victim is a police officer acting in the performance of his duty.

“Means or contact” is defined as spitting, biting, stabbing with an AIDS contaminated object, or throwing of blood or other bodily substances.

“Police officer” includes a commissioned police officer, sheriff, deputy sheriff, marshal, deputy marshal, correctional officer, constable, wildlife enforcement agent, and probation and parole officer.

An individual convicted of intentional exposure to AIDS virus shall be fined not more than \$5,000, imprisoned with or without hard labor for not more than ten years, or both. Whoever commits the crime against a police officer shall be fined not more than \$6,000, imprisoned with or without hard labor for not more than eleven years, or both.

²⁸⁸ Under the public health laws of Louisiana, it is unlawful for any person to “inoculate or infect another person in any manner with a venereal disease or to do any act which will expose another to inoculation or infection with a venereal disease.” LA. REV. STAT. ANN. § 40:1062 (1918); *See also* LA. REV. STAT. ANN. § 40:1068 (1918); *Meany v. Meany*, 639 So.2d 229 (La. 1994) (imposing a civil duty on those infected with a venereal disease to either abstain from sex or warn sexual partners). A venereal disease is defined as “syphilis, gonorrhea, chancroid, or any other infectious disease primarily transmitted from one person to another by means of a sexual act.” LA. REV. STAT. ANN. § 40:1061 (2007). However, because this law was enacted in 1918, long before the discovery of HIV, and because Louisiana has enacted a separate criminal statute concerning HIV exposure, it is unlikely that this statute will be used to penalize HIV exposure.

Any number of consensual sexual activities may result in prosecution and imprisonment.

It is an unlawful act, punishable by up to ten years in prison and/or a \$5,000 fine,²⁸⁹ to expose another to HIV/AIDS through sexual contact.²⁹⁰ Sex offender registration may also be required.²⁹¹ Despite the language in the statute, Louisiana courts have found that neither the intent to transmit HIV²⁹² nor actual transmission is required.²⁹³

It is a defense if exposure to HIV was with “knowing and lawful consent.”²⁹⁴ This means that an HIV-positive person will not likely be prosecuted for engaging in consensual sexual intercourse with a partner fully aware of her/his HIV status, as long as that partner is above the age of consent in Louisiana.²⁹⁵

However, disclosure of HIV status may be difficult to prove as most evidence is based on the testimony of the parties where it is one person’s word against the other’s. In *State v. Gamberella*,²⁹⁶ an HIV-positive man was convicted of HIV exposure despite his testimony that he disclosed his HIV-positive status to his girlfriend and wore condoms during sex. The man’s girlfriend, the complainant, testified that after she became pregnant by the defendant after a condom failed, they engaged in unprotected sexual intercourse on multiple occasions. She testified that she didn’t know his HIV-positive status during the entire relationship. The defendant was convicted and sentenced to ten years in prison at hard labor.

On appeal, the defendant in *Gamberella* argued that the law failed to define such terms as “expose” and “sexual contact,” and therefore could prohibit activities posing no risk of HIV transmission, including kissing. The Court of Appeal of Louisiana rejected these arguments, holding that the statute described prohibited conduct with sufficient particularity. The court reasoned that the term “sexual contact . . . unambiguously [refers to] numerous forms of behavior involving use of the sexual organs of one or more of the participants or involving other forms of physical contact for the purpose of satisfying or gratifying the ‘sexual desires’ of one of the participants.”²⁹⁷ The preceding phrase, in and of itself, is ambiguous and provides absolutely no clarity as to what types of sexual conduct can be prosecuted under the statute. Under the court’s definition, acts that don’t involve an exchange of bodily fluids or penetration could be prosecuted. The court’s findings also don’t provide insight into whether or not the use of condoms or other form of protection would be a defense to prosecution.

²⁸⁹ LA. REV. STAT. ANN. § 14:43.5(E)(1) (1993).

²⁹⁰ § 14:43.5(A).

²⁹¹ § 541(24)(2005) (modified with minor changes by 2010 La. Sess. Law Serv. Act. 387 (H.B. 825)).

²⁹² See, e.g., *State v. Roberts*, 844 So. 2d 263, 272 (La. Ct. App. 2003) (“La. R.S. 14:43.5 does not require the State to prove that a defendant acted with the specific intent to expose the victim to [HIV] . . . it requires the State to prove that the defendant intentionally committed an act proscribed by the statute which exposed the victim to [HIV].”)

²⁹³ See, e.g., *State v. Gamberella*, 633 So. 2d 595, 602 (La. Ct. App. 1993) (“By use of the word ‘expose’ rather than the word ‘transmit,’ the legislature obviously intended that the element of the offense be the risk of infection, rather than actual transmission of the virus.”); accord *Roberts*, 844 So. 2d at 272.

²⁹⁴ LA. REV. STAT. ANN. § 14:43.5(A)(1993).

²⁹⁵ See, e.g., LA. REV. STAT. ANN. § 14:80 (2004) (defining “juvenile” as an individual under the age of seventeen for the purpose of “carnal knowledge” laws).

²⁹⁶ *Gamberella*, 633 So. 2d at 598-60.

²⁹⁷ *Id.* citing Cheney C. Joseph, Jr., *Developments in the Law 1986-1987: A Faculty Symposium*, 48 LA. L. REV. 257 (1987).

Other cases that have been prosecuted under the statute include:

- In *State v. Serrano*, an HIV-positive man was sentenced to one year in prison at hard labor after he engaged in unprotected sex with his girlfriend without disclosing his HIV status.²⁹⁸
- In *State vs. Turner*, an HIV-positive woman received two concurrent five-year prison sentences after she pleaded guilty to engaging in “some sort of sexual contact” with two men.²⁹⁹ A sentencing court equated the woman’s activities to “pointing a gun to [the victims’] head[s] and pulling the trigger.”³⁰⁰
- In 1999, an HIV-positive woman received four years probation and registered as a sex offender after engaging in unprotected sex with at least two men.³⁰¹
- In 2002, an HIV-positive man was arrested after he allegedly engaged in unprotected sex with a woman without disclosing his HIV status.³⁰²
- In *State v. Roberts*, an HIV-positive man received ten years in prison at hard labor for exposing his rape victim to HIV.³⁰³ Although a dispute existed as to whether bodily fluids were exchanged, an appeals court found that the defendant’s conviction could be sustained on evidence that he anally and vaginally raped his victim.³⁰⁴

Spitting, biting, and other exposures to bodily fluids can result in criminal liability.

Louisiana criminalizes several forms of HIV exposure beyond sexual contact that pose no risk of HIV infection, including biting and spitting. It is an unlawful act, punishable by up to ten years in prison (with or without hard labor) and/or a \$5,000 fine,³⁰⁵ to expose a person to any AIDS virus through *any* means or contact without the knowing and lawful consent of the person exposed.³⁰⁶

If an HIV-positive person (1) exposes a police officer to HIV through “any means or contact,” and (2) has reasonable grounds to believe that the person exposed is a police officer, HIV exposure is punishable by up to eleven years in prison (with or without hard labor) and/or a \$6,000 fine.³⁰⁷ This sentence enhancement also applies to correctional officers, parole officers, and several other “police officers,” including probation officers, sheriffs, deputy sheriffs, marshals, deputy marshals, constables, and wildlife enforcement agents.³⁰⁸

²⁹⁸ 715 So. 2d 602, 602-03 (La. Ct. App. 1998).

²⁹⁹ 927 So. 2d 438, 439-41 (La. Ct. App. 2005).

³⁰⁰ *Turner*, 927 So.2d at 441.

³⁰¹ Joe Darby, *Woman Pleads Guilty in HIV Exposure Case*, TIMES-PICAYUNE (New Orleans), Jan. 26, 1999, at B2.

³⁰² *Metairie Man Arrested on HIV Charge*, TIMES-PICAYUNE (New Orleans), May 25, 2002, at 4-Metro.

³⁰³ *Roberts*, 844 So.2d at 270.

³⁰⁴ *Id.*

³⁰⁵ LA. REV. STAT. ANN. § 14:43.5(E)(1)(1993).

³⁰⁶ § 14:43.5(B).

³⁰⁷ § 14:43.5(C).

³⁰⁸ § 14:43.5(D)(2).

Neither the intent to transmit HIV nor actual transmission is required.

Under the terms of this statute, “means or contact” is defined as spitting, biting, stabbing another with an AIDS-contaminated object (e.g., a used needle), or throwing blood or other “bodily substance.”³⁰⁹ Although throwing blood or other “bodily substances” is listed as a criminal offense under the terms of this statute, “bodily substance” is not defined.³¹⁰ This statute thus presents the risk that exposure to saliva, urine, sweat, or other “bodily substances” posing no risk of HIV infection may result in criminal prosecution.

In *State v. Roberts*,³¹¹ for example, an HIV-positive defendant was convicted of intentionally exposing a rape victim to HIV after he raped and bit her. On appeal, the defendant argued that the state failed to prove that (1) biting a person could expose that person to HIV, (2) the teeth of an HIV-positive man could be “AIDS-contaminated” objects, (3) that his mouth contained saliva, and (4) that his bite broke his victim’s skin.³¹² The Court of Appeal of Louisiana rejected these arguments because the statute specifically noted biting to be an offense under the statute.³¹³ The court did not consider that the CDC has long maintained that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”³¹⁴

The CDC has also concluded that spitting alone has never been shown to transmit HIV.³¹⁵ Louisiana’s statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

Attempted murder³¹⁶ prosecutions have been used for intentional exposure to HIV.

Individuals with HIV in Louisiana may be prosecuted for HIV exposure under general criminal laws, including attempted murder. In the past, these prosecutions have arisen from the rare and extreme cases where HIV-positive persons attempt to purposefully infect others with the virus. In *State v. Caine*,³¹⁷ an HIV-positive man was convicted of attempted second-degree murder after he allegedly

³⁰⁹ § 14:43.5(D)(1).

³¹⁰ § 14:43.5(D)(1).

³¹¹ 844 So. 2d 263, 265-69 (La. Ct. App. 2003).

³¹² *Id.* at 270-71.

³¹³ *Id.* at 271.

³¹⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

³¹⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

³¹⁶ In another case involving HIV-infected syringes, a Louisiana doctor received fifty years in prison at hard labor after he was convicted of injecting his ex-lover with HIV and Hepatitis C. The doctor extracted tainted blood from two patients and transferred it to the woman, who believed she was getting an injection of a vitamin supplement. This case was not based on the doctor’s HIV status and as such as not reflective of prosecutions against HIV-positive persons. 771 So. 2d 131 (La. Ct. App. 2000) (affirming conviction and sentence), *writ denied*, 798 So. 2d 105 (La. 2001), *cert. denied*, 535 U.S. 905 (2002); *see also* *State v. Schmidt*, 699 So. 2d 448 (La. Ct. App. 1997) (denying writ application concerning two pre-trial evidentiary rulings regarding admissibility of DNA evidence), *writ denied*, 706 So. 2d 451 (La. 1997); *Schmidt v. Hubert*, No. 05-2168, 2008 WL 4491467 (W.D. La. Oct. 6, 2008) (denying habeas corpus petition challenging conviction).

³¹⁷ 652 So. 2d 611 (La. Ct. App. 1995), *writ denied*, 661 So. 2d 1358 (La. 1995).

stuck a store clerk with a syringe full of clear liquid and said “I’ll give you AIDS.” The syringe was never recovered, and it is not known whether the clear liquid was contaminated with HIV.³¹⁸ However, because the defendant was HIV-positive, pulled a needle out of his pocket, and had “track marks” on his arm suggesting a history of drug use, the Court of Appeal of Louisiana found it likely that the needle was infected with HIV, and affirmed the defendant’s sentence of fifty years in prison at hard labor.

HIV-positive status can result in an enhanced sentence upon conviction.

HIV-positive status can be a factor in enhanced sentences for sexual assault. Sentencing courts sometimes see HIV-positive status as a relevant consideration when measuring the impact of a crime on the victim (See, e.g., Kentucky, Utah, Texas).

In *State v. Richmond*,³¹⁹ the Court of Appeal of Louisiana rejected an argument from an HIV-positive sex worker that a ten-year sentence for conviction of a crime against nature by soliciting unnatural oral copulation for compensation was excessive. Although the court noted that a ten-year sentence was harsh, the trial judge, who is afforded wide discretion on sentencing, supported the sentence by stating that the woman committed prostitution with knowledge of her HIV-positive status and should, therefore, be punished to the full extent of the law for the danger that she posed to others “who are not ill right now, who can be protected.”³²⁰ The trial court compared the woman’s actions to imposing a death sentence for others “because of what [she carries] around inside [her] body.”³²¹ The Louisiana Court of Appeal affirmed the defendant’s sentence of ten years in prison based on her prior record as a third felony offender. Despite the fact that the defendant did not engage in oral sex, and even if she had there was only a remote chance of exposing another to HIV in such a manner, she was sentenced to the full extent of the law, in large part based on her HIV status.³²²

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

³¹⁸ *Caine*, 652 So. 2d at 616.

³¹⁹ 708 So. 2d 1272 (La. Ct. App. 1998).

³²⁰ *Richmond*, 734 So. 2d 33 at 38. .

³²¹ *Richmond*, 708 So. 2d at 1276.

³²² *Id.* at 1273.

Maine Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statutes regarding HIV exposure

There are no statutes explicitly criminalizing HIV transmission or exposure in Maine. However, some states have prosecuted HIV-positive people for exposing others to the virus under general criminal laws, such as those governing reckless endangerment and aggravated assault. At the time of this publication, we are not aware of a criminal prosecution of an individual on the basis of his/her HIV-positive status in Maine.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

Maryland Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MD. CODE ANN., HEALTH-GEN. § 18-601.1*****Misdemeanor: knowing transfer of HIV***

- (a) An individual who has the human immunodeficiency virus may not knowingly transfer or attempt to transfer the human immunodeficiency virus to another individual.
- (b) A person who violates the provisions of this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$2,500 or imprisonment not exceeding 3 years or both.

HIV-positive persons may face misdemeanor penalties for engaging in various activities.

In Maryland, it is a misdemeanor punishable by a sentence of up to three years in prison and/or a \$2,500 fine for an HIV-positive person to knowingly transfer or attempt to transfer HIV to another.³²³ This law targets HIV-positive persons who are (1) aware of their HIV status and (2) knowingly engage in activities posing risks of HIV infection. Any number of HIV exposures, including consensual sexual intercourse, blood and tissue donation, breastfeeding, and/or needle-sharing, may be subject to prosecution.

On its face, neither disclosure nor the use of condoms or other protection would be an affirmative defense to prosecution. The statute potentially targets a wide range of activities without defined limitations to what conduct may or may not face potential prosecution.

Few cases in Maryland clarify the scope of this HIV exposure statute. One prosecution suggests that individuals with HIV may face prosecution regardless of whether they expose others to an actual risk of HIV transmission. In May 2008, a 44-year-old, HIV-positive man was charged with knowingly attempting to transfer HIV after he bit a police officer during an arrest.³²⁴ He later received eighteen years in prison after pleading guilty to drug and assault charges. The officer did not test positive for HIV but such evidence is not relevant to prosecution. The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite, and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”³²⁵ Maryland’s statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

³²³ MD. CODE ANN., HEALTH-GEN. § 18-601.1 (West 2010).

³²⁴ Amber Parcher, *HIV-positive Suspect Who Bit Officer Gets 18 Years*, GAZETTE.NET, June 4, 2008, http://www.gazette.net/stories/060408/burtnew215303_32365.shtml.

³²⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

In March 2010, a 29-year-old, HIV-positive man was charged with seven counts of knowingly attempting to transfer HIV after he had consensual sex with a woman he met online and did not disclose his HIV status.³²⁶ He later pleaded guilty to reckless endangerment and received eighteen months in jail.³²⁷ The same man was charged under Maryland's HIV exposure law in 2005 after he engaged in consensual but unprotected and undisclosed, intercourse with a different woman.³²⁸ He also pleaded guilty to reckless endangerment in that case.

HIV exposure cases have been prosecuted under general criminal laws, including attempted murder and reckless endangerment.

Prosecutions for HIV exposure in Maryland have typically arisen under general criminal laws as opposed to the 'knowing transfer of HIV' statute. General criminal law charges occur regardless of whether HIV-positive persons exposed others to significant risks of HIV infection. In Maryland, reckless endangerment, which has been used in multiple prosecutions, is defined as recklessly engaging in "conduct that creates a substantial risk of death or serious physical injury to another."³²⁹

In 1999, a 20-year old, HIV-positive man was convicted of second-degree assault and reckless endangerment for biting a security guard in the arm during a struggle.³³⁰ He was sentenced to five years in jail, with all but eighteen months suspended. The guard tested negative for HIV but the transmission of HIV is not required for a prosecution for reckless endangerment.³³¹

In July 2010, a 44-year old, HIV-positive defendant was sentenced to five years in prison for second-degree assault after he was convicted of spitting on a police officer.³³² Because the defendant had no teeth and often spat unintentionally, it is not clear whether the man intended to spit on the police officer. The CDC has long maintained that spitting alone has never been shown to transmit HIV and, on the basis of the facts of the case, the defendant failed to engage in conduct creating a substantial risk of death or serious injury that would warrant his conviction and five-year sentence.³³³

At least two cases in Maryland have ruled that an attempted murder charge cannot be used in cases of HIV exposure unless there is a specific intent to murder through the transmission of HIV. In 1996, a 47-year old, HIV-positive man was convicted of assault with intent to murder and sentenced to ninety years in prison after he sexually assaulted his 9-year-old step-grandson.³³⁴ The man's sentence was later reduced to sixty years after the Maryland Court of Special Appeals ruled that his awareness of his HIV-positive status was not proof of intent to murder.³³⁵ The boy twice tested

³²⁶ Patricia Murrett, *Man Sentenced for Exposing Woman He Met Online to HIV*, GAZETTE.NET, Mar. 10, 2010, http://www.gazette.net/stories/03102010/damanew224501_32560.php.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ MD. CODE ANN., CRIM. LAW § 3-204 (West 2010).

³³⁰ Nancy A. Youssef, *HIV-positive Man Bit Security Guard in Fight, Police Say*, BALTIMORE SUN, June 20, 1999, at 5B.

³³¹ *Id.*

³³² Don Aines, *Man With HIV Who Spit on Police Officer Sentenced to Five Years*, HERALD-MAIL (Hagerstown, MD), July 26, 2010, http://www.herald-mail.com/?cmd=displaystory&story_id=249796&format=html&autoreload=true.

³³³ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be spread by an HIV-infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

³³⁴ Amy L. Miller, *Man Who Raped Step-grandson Given 90 Years*, BALTIMORE SUN, Feb. 2, 1996, at 2B.

³³⁵ *HIV-Positive Man Convicted of Child Abuse Given Reduced Sentence*, DAILY REC. (Baltimore), July 31, 1997, at 7.

negative for HIV, but this information is not relevant in a prosecution unless it would go to show the intent of the defendant.³³⁶

The Court of Appeals of Maryland came to a similar conclusion in *Smallwood v. State*.³³⁷ In *Smallwood*, an HIV-positive man was convicted of assault with intent to murder, reckless endangerment, and attempted murder after pleading guilty to attempted first-degree rape and robbery with a deadly weapon, when he raped and robbed three women at gunpoint. In addition to other sentences, the man received thirty years in prison for assault with intent to murder base on his raping the women while knowing of his HIV status. On appeal, the defendant argued that sexually assaulting the women with knowledge of his HIV-positive status was not sufficient to find an intent to kill. The prosecution countered that engaging in unprotected sexual intercourse while HIV-positive is equivalent to firing a loaded firearm at an individual, an act from which a jury could infer the intent to kill.

The court determined that the State had only provided evidence that the defendant intended to rob and rape the victims – not that he intended to kill them. The court reasoned that death by AIDS from a single exposure to HIV was not sufficiently probable to show that the defendant intended to kill his victims. The court also distinguished the defendant's case from cases in other states where intent to kill was clearly evident by evidence such as: (1) statements suggesting that a person wished to spread HIV or (2) actions solely explainable as an attempt to spread HIV, such as splashing blood.

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³³⁶ *Id.*

³³⁷ 680 A.2d 512 (Md. 1996).

Massachusetts Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Though there is no explicit statutes regarding HIV exposure prosecution under general criminal laws have occurred.³³⁸

There are no statutes explicitly criminalizing HIV transmission or exposure in Massachusetts. However, HIV-positive individuals have been prosecuted under general criminal laws in Massachusetts.

In *Commonwealth v. Smith*,³³⁹ an HIV-positive man was indicted on charges for assault with intent to commit murder after he allegedly bit a corrections officer on the arm and screamed: “I’m HIV-positive. I hope I kill you,” and “You’re all gonna die, I have AIDS.” Another officer testified before the grand jury that a doctor told him that HIV transmission from a human bite is possible if an attacker’s gums are bloody. Despite the fact that the chances of HIV transmission from a human bite are at best remote,³⁴⁰ a grand jury indicted the defendant in *Smith* and the defendant later pleaded guilty.³⁴¹ Conviction for assault with intent to commit murder can result in imprisonment of up to ten years.³⁴²

Smith demonstrates that HIV-positive status can be the basis for a serious criminal charge in Massachusetts, regardless of whether the complainant was exposed to any risk of HIV infection. In a 1996 case, a 38-year old man in Massachusetts was charged with assault with a “deadly weapon” after he allegedly told two police officers he had AIDS and spat at them. The police officers said that “by him spitting at us, he was attempting to infect us.”³⁴³ The CDC has long maintained that spitting alone has never been shown to transmit HIV.³⁴⁴

Murder charges may also be possible in cases where an HIV-positive person intentionally infect others with HIV and those infected later die of AIDS. In *Commonwealth v. Casanova*,³⁴⁵ the court, upholding a murder conviction where the defendant shot a man who became paralyzed and died of breathing problems six years later, supported its ruling analogizing the facts to an HIV infection

³³⁸ Mass. Gen. Laws Ann. 265 § 22b(f) (2008) mandates a fifteen-year-to-life sentence for a defendant who has forced sexual intercourse with a child under 16-years-old, the defendant “knew or should have known” that she/he was a carrier for an STI or STD, and that the minor could have contracted the STD or STI. There is no case on record that this statute has been applied to HIV-positive persons.

³³⁹ 790 N.E.2d 708, 712 (Mass. App. Ct. 2003).

³⁴⁰ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

³⁴¹ *Smith*, 790 N.E.2d at 709.

³⁴² MASS. GEN. LAWS ANN. ch. 265 § 15 (West 2010).

³⁴³ Associated Press, *AIDS Spitting Case Hits Courts*, AEGIS.COM, Dec. 12, 1996, <http://www.aegis.org/news/ap/1996/AP961217.html>.

³⁴⁴ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

³⁴⁵ 708 N.E.2d 86, 87 (Mass. 1999).

situation where murder charges could result, even if a victim dies long into the future.³⁴⁶ The defendant argued that the “year and a day” rule, no longer in effect in Massachusetts (dictating that murder charges may only result if victims die within a year and a day of an alleged attack), should be replaced by another time limit in order to protect rights to due process and a speedy trial. The Supreme Judicial Court of Massachusetts disagreed, stating that medical science had advanced enough to make arbitrary time limits unnecessary in cases where the link between an assault and a victim’s death can be proven.³⁴⁷

Of course, in situations of HIV exposure there are often problems establishing if the defendant indeed infected another person. The first person to test positive can often be deemed the culprit even though she/he may have been infected by someone else, including the complainant. Even if it was the accused party who was infected first, it could have been a third party who infected the complainant. Prosecutors have been using “phylogenetic testing,” which focuses on establishing a genetic connection between the HIV viruses of the two parties. But such evidence only indicates similarities in the viruses and does not prove who infected whom or the source of the virus. Such technology is also not well understood by law enforcement, attorneys, judges, or people living with HIV and fails to provide sufficient evidence for prosecution.³⁴⁸

HIV-positive status may also lead to increased prison sentences in sexual assault cases. In *Commonwealth v. Boone*,³⁴⁹ an HIV-positive man was convicted of rape of a child and sentenced to five years in prison when he anally raped his 14-year-old cousin. The boy later revealed the events to a doctor after discovering that he was HIV-positive. On appeal, the defendant argued that at sentencing the judge improperly considered the fact that the defendant knew his HIV-positive status when he raped the boy. The Appeals Court of Massachusetts rejected this argument, agreeing with the sentencing judge that although it could not be proven that the defendant transmitted HIV to his cousin, the fact that he committed a sexual assault with knowledge of his HIV-positive status was a valid consideration during sentencing.

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³⁴⁶ *Id.* (“Although it will undoubtedly be difficult in many cases for the prosecution to prove causation where death is remote in time from the allegedly precipitating injury, in cases where this link can be proved, such as where a slow-acting poison is used or where a person purposely infects another with a virus such as HIV, prosecution should not be barred by some arbitrary time limit.”)

³⁴⁷ *Id.* at 90.

³⁴⁸ RALF JURGENS ET AL., 10 REASONS TO OPPOSE THE CRIMINALIZATION OF HIV EXPOSURE OR TRANSMISSION 18 (Open Society Institute 2008).

³⁴⁹ No. 02-P-536, 2003 WL 22087552, at *1 (Mass. App. Ct. Sept. 9, 2003).

Michigan Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MICH. COMP. LAWS ANN. § 333.5210*****Class F, Person Felony: Sexual penetration with uninformed partner***

A person who knows that he/she has been diagnosed as having AIDS or AIDS-related complex (ARC), or who knows that he/she is infected with HIV, and who engages in sexual penetration with another person without having first informed the other person that he/she has AIDS/ARC/HIV, is guilty of a felony.

“Sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body. Emission of semen is not required.

MICH. COMP. LAWS ANN. § 333.11101***Violation: donation or sale of blood or blood products***

An individual shall not donate or sell his/her blood or blood products to a blood bank or storage facility or to an agency or organization that collects blood or blood products for a blood bank or storage facility knowing that he/she has tested positive for the presence of HIV or an antibody to HIV. A blood bank or other health facility to which blood or blood products is donated in violation of this section immediately shall notify the local health department of the violation.

Engaging in sexual intercourse without disclosing HIV status can lead to felony charges.

In Michigan, it is a felony punishable by up to four years in prison³⁵⁰ if a person aware that she/he is HIV-positive and engages in “sexual penetration” with a person uninformed of her/his HIV status.³⁵¹ Neither the intent to transmit HIV nor actual transmission is required.

³⁵⁰ MICH. COMP. LAWS ANN. § 777.13k (West 2006) (categorizing sexual intercourse with an uninformed partner as a Cclass F, person felony). For information on minimum sentences, consult sentencing instructions at § 777.21. *See also* § 777.22 (outlining offense variables apply to different offense categories); MICH. COMP. LAWS ANN. §§ 777.31-49a (2006) (providing point system for each offense variable); § 777.67 (providing minimum sentences for Cclass F felonies). *But see* H.B. 6328, 95th Leg., 2010 Reg. Sess. (Mich. 2010) (proposing to require definite terms of imprisonment and repeal portions of Michigan’s sentencing guidelines); *see also* MICH. SENTENCING GUIDELINES MANUAL (2010), available at <http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm..>

Michigan defines “sexual penetration” as penile-vaginal sex, oral sex, anal sex, and *any* other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.³⁵² The emission of semen is not required.³⁵³ The use of condoms or other protection during sexual penetration is not a defense.

The only defense to prosecution is if HIV-positive persons disclose their HIV status to sexual partners before engaging in sexual penetration. However, the disclosure of HIV status during private, sexual activities may be difficult to prove without witnesses or documentation, and evidence often rests of the testimonies of the parties where it is one person’s word against the other. In *People v. Flynn*, a former lover of an HIV-positive man testified that she engaged in unprotected sexual intercourse with him and he failed to inform her of his HIV-positive status.³⁵⁴ The man testified that he informed the complainant of his HIV status before they engaged in sexual intercourse and that he wore a condom. He further argued that the woman’s testimony was inadmissible evidence against his character. The court ruled that the woman’s testimony was admissible as it had the clear purpose of showing that the man had a general scheme to conceal his HIV status. In these situations, there are inherent problems when the only evidence available is the testimonies of the parties.

Despite its potential to criminalize safe sexual practices, Michigan’s uninformed partner law has survived legal challenges that it is unconstitutionally overbroad.³⁵⁵ In *People v. Jensen*,³⁵⁶ a mentally-impaired, HIV-positive woman received three concurrent prison terms of two years and eight months to four years after she engaged in unprotected sex with a man on three occasions. On appeal, she argued that the statute failed to differentiate between consensual and nonconsensual intercourse, and would seem to require that rape victims inform their attackers of their HIV status.

The Court of Appeals of Michigan rejected this argument, finding that the defendant did not have standing to challenge the statute on such grounds because her case did not involve forced sexual intercourse. The court found that the defendant’s actions of engaging in unprotected, consensual sex without disclosing her HIV status was clearly prohibited by law and rejected the defendant’s argument that Michigan’s uninformed partner law is unconstitutional due its lack of a clear intent requirement.

Looking to the reasoning of the Michigan legislature, the court held that the statute required only a general intent to engage in sexual penetration while failing to disclose HIV status. An HIV-positive person who fails to disclose her/his status could be considered grossly negligent because non-disclosure could only achieve the “further dissemination of a lethal, incurable disease in order to gratify the sexual or other physical pleasures of the already infected individual.”³⁵⁷

³⁵¹ MICH. COMP. LAWS ANN. § 333.5210; *See also* *Doe v. Johnson*, 817 F.Supp. 1382 (W.D. Mich. 1993) (finding that a woman’s claims for negligent or fraudulent transmission of HIV could be maintained if defendant knew (1) that he was HIV-positive, (2) that he was suffering from HIV-related symptoms, or (3) that a prior sex partner was HIV-positive).

³⁵² MICH. COMP. LAWS ANN. § 333.5210(2) (2001).

³⁵³ *Id.*

³⁵⁴ *People v. Flynn*, No. 199753, 1998 WL 1989782, at *1 (Mich. Ct. App. Sept. 25, 1998).

³⁵⁵ *See, e.g., People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App 1998); *Flynn*, No. 199753, 1998 WL 1989782.

³⁵⁶ 564 N.W.2d 192, 194-95 (Mich. Ct. App. 1997), *vacated in part, appeal denied in part by* 575 N.W.2d 552 (Mich. 1998).

³⁵⁷ *Id.* at 754.

The Michigan Court of Appeals rejected another constitutional challenge to the state's HIV disclosure laws in *People v. Flynn*.³⁵⁸ In that case, an HIV-positive man was convicted of failing to tell his sexual partners, with whom he engaged in unprotected sex, that he was HIV-positive. On appeal, he argued that Michigan's uninformed partner law was unconstitutionally overbroad, because the law's definition of "sexual penetration" included activities that could not spread the virus. The court found that the defendant had no basis for challenging the scope of the law because the defendant had engaged in unprotected sexual intercourse, which was "clearly encompassed" by the statute's language. The defendant was sentenced to two concurrent terms of thirty-two to forty-eight months in prison.

Several other HIV-positive individuals in Michigan have been prosecuted for engaging in sexual intercourse without disclosing their status to partners:

- In November 2010, a man was charged with two felony counts of sexual penetration of an uninformed partner for allegedly having sex with two women without disclosing his HIV status.³⁵⁹
- In *People v. Selemogo*,³⁶⁰ an HIV-positive man received 108 to 240 months in prison for criminal sexual contact and nine months in prison for sexual penetration with an uninformed partner after he sexually assaulted a woman in her sleep.
- In *People v. Clayton*,³⁶¹ an HIV-positive man received fifty-eight months to fifteen years in prison after he allegedly engaged in unprotected anal and oral sex with a man without informing the man of his HIV status.
- An HIV-positive man received four to six years in prison in 1999 after pleading guilty to failing to disclose his HIV status to his then-girlfriend.³⁶²
- In September 2008, an HIV-positive man was charged with four counts of engaging in sexual penetration with an uninformed partner when he allegedly had sex with multiple women without disclosing his HIV status.³⁶³
- In December 2008, a 36-year-old woman pleaded guilty for failing to inform several sexual partners that she was HIV-positive. She was sentenced to the sixty-eight days

³⁵⁸*Flynn*, No. 199753, 1998 WL 1989782.

³⁵⁹Lisa LaPlante, *HIV-positive Man Charged With Having Sex, Not Telling Partners of Status*, WSBT.COM, Nov. 15, 2010, <http://www.wsbt.com/news/fox17-hivpositive-man-charged-with-h-111510,0,7741407.story>.

³⁶⁰No. 273410, 2008 WL 902287, at *1 (Mich. Ct. App. Apr. 3, 2008) (unpublished).

³⁶¹No. 230328, 2002 WL 31058331, at *1 (Mich. Ct. App. Sept. 13, 2002) (unpublished), *sentencing modified after new sentencing hearing* in No. 245260, 2004 WL 895857 (Mich. Ct. App. Apr. 27, 2004) (unpublished).

³⁶²*Michigan Man Sentenced for Not Disclosing HIV Status*, 14 AIDS POL'Y & L. 15, Aug. 20, 1999.

³⁶³*Underage girls Allege Illegal Sex; HIV-positive Man Charged with Violating AIDS Disclosure Law*, GRAND RAPIDS PRESS (Michigan), Sept. 13, 2008, at A4; *see also Montcalm Man Faces Charge of Not Disclosing HIV Infection to Sex Partners*, MLIVE.COM, Sept. 5, 2008, http://www.mlive.com/news/grandrapids/index.ssf/2008/09/montcalm_county_man_faces_char.html.

in prison for time already served and five years probation.³⁶⁴ The woman was arrested again after engaging in sex work and allegedly violating her probation.³⁶⁵

- In November 2009, a 21-year-old man received a nine-month prison sentence, three years probation, and a \$1,250 fine after he engaged in sexual intercourse with a woman without informing her that he was HIV-positive.³⁶⁶
- In July 2009, an HIV-positive woman employed at a sex club was arrested by police informants for failing to disclose her HIV status.³⁶⁷ She was sentenced to sixteen months to twenty years for failing to disclose her HIV status and for drug offenses.³⁶⁸
- In February 2009, a 25-year-old man was sentenced to two months in prison after he failed to disclose his HIV-status to several sexual partners.³⁶⁹
- In March 2010, a 54-year-old, HIV-positive woman was arrested and charged under Michigan's uninformed partner law after she allegedly engaged in sexual intercourse without disclosing her HIV status to her partner.³⁷⁰

HIV-positive blood has been considered a “harmful biological substance” under Michigan bioterrorism laws.

HIV-positive blood is considered a “harmful biological substances” under the Michigan's bioterrorism laws³⁷¹ and exposing others to HIV-positive blood may increase prison sentences for assault or may be prosecuted as a crime of its own.

Enhanced sentences for blood exposure are possible regardless of whether HIV infection was possible under the circumstances. In *People v. Odom*, an HIV-positive inmate was convicted on three counts of assault when he allegedly punched and spat on correctional officers during an altercation.³⁷² Because he was bleeding from the mouth during the assault,³⁷³ and because his saliva

³⁶⁴ Rex Hall Jr., *Kalamazoo Woman with HIV is the Second Person to Face Charges Within a Month*, KALAMAZOO GAZETTE (Michigan), Oct. 8, 2008; See also Sarah Crone, *Woman Spared More Jail Time in HIV Case*, MLIVE.COM, Dec. 10, 2008, http://www.mlive.com/news/kalamazoo/index.ssf/2008/12/woman_spared_more_jail_time_in.html.

³⁶⁵ Lynn Turner, *Man with HIV Who Had Sex with Unwitting Partners Gets Jail*, KALAMAZOO GAZETTE (Michigan), Feb. 3, 2009, available at <http://www.mlive.com/news/kzgazette/index.ssf?/base/news-32/123367623451600.xml&coll=7>.

³⁶⁶ Kelly Dame, *Man Charged in AIDS Case Sentenced*, MIDLAND DAILY NEWS, Nov. 18, 2009, http://www.ourmidland.com/police_and_courts/article_e2dc9201-86cc-51ae-beab-b61226b1f642.html.

³⁶⁷ *US: Michigan Strip Club Employee Pleads No Contest to HIV Non-Disclosure (Updated)*, CRIMINALHIVTRANSMISSIONBLOGSPOT.COM, July 14, 2009, <http://criminalhivtransmission.blogspot.com/2009/07/us-michigan-strip-club-employee-pleads.html>.

³⁶⁸ Norma Lerner, *Escape Reality Dance “Star” Gets Up to 20 Years*, NILES STAR (Michigan), Sept. 21, 2009, <http://www.nilesstar.com/2009/09/21/escape-reality-dancer-star-gets-up-to-20-years/>.

³⁶⁹ Lynn Turner, *Man with HIV Who Had Sex with Unwitting Partners Gets Jail*, KALAMAZOO GAZETTE (Michigan), Feb. 3, 2009, available at <http://www.mlive.com/news/kzgazette/index.ssf?/base/news-32/123367623451600.xml&coll=7>.

³⁷⁰ Mark Ranzenberger, *Rosebush Woman Faces Prison on HIV Charge*, MORNING SUN (Mount Pleasant, MI), Mar. 10, 2010, <http://www.themorningsun.com/articles/2010/03/10/news/doc4b98204b317bb718709599.txt>.

³⁷¹ See generally *People v. Odom*, 740 N.W.2d 557 (Mich. Ct. App. 2007).

³⁷² 740 N.W.2d at 560.

³⁷³ *Id.* at 561.

containing blood was deemed a “harmful biological substance” under state bioterrorism laws,³⁷⁴ the spitting incident led to an increased sentence of five to fifteen years.³⁷⁵

The defendant’s appeal was the first opportunity for the Michigan Court of Appeals to determine whether the blood of an individual with HIV could be considered a “harmful biological substance” under state sentencing guidelines. Relying on a statement from the CDC website that HIV can be transmitted via blood, the Court of Appeals concluded that HIV-positive blood is a “harmful biological substance,” as it can “spread or cause disease in humans, animals, or plants.”³⁷⁶ The man’s elevated sentencing was therefore upheld.³⁷⁷

Odom failed to address how state sentencing laws could apply to HIV-positive individuals who act in self-defense in an altercation, or who have no knowledge or intention of exposing another to HIV. The ruling leaves open the possibility that HIV-positive persons will be prosecuted for unintentional blood exposures that occur when they are attacked by others or are victims of prison guard misconduct. The defendant in *Odom* denied that he initiated the altercation or that he spit at the officers. Although the defendant did have a bloody mouth after his altercation with prison guards, the court did not discuss how he received his injuries.

In 2010, another HIV-positive man was charged under Michigan’s bioterrorism law for allegedly biting his neighbor during an altercation. In *People v. Allen*,³⁷⁸ the defendant was charged under bioterrorism laws due to the “possession” of a harmful biological substance (i.e., HIV) with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill another.³⁷⁹ There was no evidence that the man was bleeding from the mouth at the time of the bite, that he intended to transmit HIV, or that he exposed his neighbor to anything but saliva.³⁸⁰

This initial charge disregarded the fact that the CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”³⁸¹ The CDC has also concluded that spitting alone has never been shown to transmit HIV.³⁸²

The Macomb County Circuit Court dismissed the bioterrorism charge as unfounded. Relying on a statement from the CDC, the court acknowledged that saliva, tears, or sweat has never been shown

³⁷⁴ *Id.*; see also MICH. COMP. LAWS ANN. § 750.200h(g) (2004) (defining “harmful biological substance” as a bacteria, virus, or other microorganism or toxic substance derived from or produced by an organism that can be used to cause death, injury, or disease in humans, animals, or plants.)

³⁷⁵ *Odom*, 740 N.W.2d at 560; see also MICH. COMP. LAWS ANN. § 777.31(1)(b) (2006) (imposing twenty additional sentencing points for exposures to harmful biological substances).

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 562.

³⁷⁸ No. 2009-4960 (Macomb County Ct. Mich. Cir. Ct. June 2, 2010), available at <http://www.hivlawandpolicy.org/resources/view/517>.

³⁷⁹ *Id.* at *2; see also MICH. COMP. LAWS ANN. § 750.200i(1)(a) (2004).

³⁸⁰ *Allen*, No. 2009-4960 at *3.

³⁸¹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

³⁸² CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

to result in HIV transmission. However, the court also cited *Odom* and confirmed that HIV-infected blood is a “harmful biological substance” under state bioterrorism laws. Thus, *Allen* did nothing to remove the risk that an HIV-positive individual can be arrested and charged as a “bioterrorist” under Michigan state law, but did help illuminate the fallacies of prosecuting HIV-positive persons for spitting and biting.

HIV-positive status can be considered a factor in sentencing.

Under Michigan state law, a sentencing court may go beyond sentencing guidelines and impose a minimum sentence above what is recommended if there is a substantial and compelling reason to do so.³⁸³ In the past, this provision of state sentencing guidelines has led to increased sentences where sexual assault victims are exposed to or infected with STIs, such as HPV.³⁸⁴ In *People v. Holder*, the Michigan Court of Appeals affirmed the eighty to 120 month sentence of the HIV-positive defendant’s conviction for sexual penetration of an uninformed partner.³⁸⁵ The court held that because the defendant did not tell his partner about his HIV status, he infected her and risked infection to his partner’s as-of-then unborn child. The court found that these facts were sufficient to uphold a sentencing of twice the standard range because of the risk he presented to the complainant’s child and the other potential people he could have exposed to HIV.

Donating blood or product products while HIV-positive is a criminal offense.

The Michigan Public Health Code prohibits individuals who are aware that they have tested positive for HIV from donating or selling blood or blood products (plasma, platelets, etc.).³⁸⁶ Neither the intent to transmit HIV nor actual transmission is required. Disclosure of HIV status before blood sales or donations is not a defense on the face of the statute. If an individual violates this law, her/his local health department will be notified immediately, and she/he she may be declared a health threat to others.³⁸⁷ The health department may send the individual an official warning, requiring that she/he participate in mandatory education programs or take legal action if the HIV-positive person continues to expose others to HIV.³⁸⁸

Important Note: While we have made an effort to ensure that this information is current, the law is

³⁸³ MICH. COMP. LAWS ANN. § 769.34(3) (2006), *limited on constitutional grounds by* *People v. Conley*, 715 N.W.2d 377 (Mich. Ct. App. 2006).

³⁸⁴ *See, e.g., People v. Grissom*, No. 251427, 2004 WL 2625034, at *2 (Mich. Ct. App. Nov. 18, 2004) (unpublished) (“Further, although points were scored for bodily injury requiring treatment, the guidelines do not take into account the extent of injury to this victim of the transmission of disease. In this case, the victim contracted Human Papillomavirus Virus (HPV), a disease that potentially may cause cervical cancer in the future.”); *People v. Castro-Isaquirre*, No. 242134, 2004 WL 737489, at *2 (Mich. Ct. App. Apr. 6, 2004) (unpublished) (“Here, the trial court based its departure on the fact that defendant, who has a sexually transmitted disease, exposed the victim, her mother, and her sister to the disease.”)

³⁸⁵ 2003 WL 22138282 (Mich. Ct. App. 2003)(per curiam).

³⁸⁶ MICH. COMP. LAWS ANN. § 333.11101 (2001).

³⁸⁷ MICH. COMP. LAWS ANN. § 333.11101; *See also* MICH. COMP. LAWS ANN. § 333.5201(1)(b) (defining a “health threat to others” as “an individual who is a carrier has demonstrated an inability or unwillingness to conduct himself or herself in such a manner as to not place others at risk of exposure to a serious communicable disease or infection.”).

³⁸⁸ MICH. COMP. LAWS ANN. § 333.5203 (outlining the procedure for issuing a health department warning notice); *see also* MICH. COMP. LAWS ANN. § 333.5205 (outlining court proceedings that may result from refusing to comply with health department warnings).

always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

Minnesota Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MINN. ST. § 609.2241*****Knowing transfer of communicable disease***

It is a crime for a person who knowingly harbors an “infectious agent” to transfer it to another person through:

1. Sexual penetration with another person without having first informed the other person that the person has a communicable disease;
2. Transfer of blood, sperm, organs, or tissue; or
3. Sharing of nonsterile syringes or needles for the purpose of injecting drugs.

This crime may be under Minnesota laws concerning: attempt; murder in the first and second degrees; and assault in the first, second, third, fourth, and fifth degrees.

It is an affirmative defense that:

1. The person who knowingly harbors an infectious agent for a communicable disease took practical means to prevent transmission as advised by a physician or other health professional; or
2. The person who knowingly harbors an infectious agent for a communicable disease is a health care provider who was following professionally accepted infection control procedures.

HIV is not identified in the statute but “communicable disease” means a disease or condition that causes serious illness, serious disability or death, or the infectious agent of which may pass or be carried from the body of one person to the body of another through direct transmission.

“Direct transmission” means predominately sexual or blood-borne transmission.

“A person who knowingly harbors an infectious agent” refers to a person who receives from a physician or other health professional:

1. Advice that the person harbors an infectious agent for a communicable disease;
2. Educational information about behavior which might transmit the infectious agent; and
3. Instruction of practical means of preventing such transmission.

“Transfer” means to engage in behavior that has been demonstrated epidemiologically to be a mode of direct transmission of an infectious agent which causes the communicable disease.

“Sexual penetration” may include sexual intercourse, cunnilingus, fellatio, or anal intercourse when the acts described are committed without the use of a latex or other effective barrier, regardless of whether emission of semen (ejaculation) occurs. MINN. STAT. § 609.341(12).

HIV status must be disclosed to sexual partners and condoms or other protection must be used during sexual activities.

In Minnesota, HIV-positive persons must disclose their HIV status to sexual partners. It is a criminal offense for any individual who knowingly “harbors” the infectious agent for a communicable disease (i.e., HIV) to engage in sexual penetration with another person without first informing that person that she/he carries that infectious agent.³⁸⁹ This offense may be charged as assault (of the first,³⁹⁰ second,³⁹¹ third,³⁹² fourth,³⁹³ and fifth³⁹⁴ degrees), attempted assault,³⁹⁵ murder (first³⁹⁶ or second degree³⁹⁷), or attempted murder.³⁹⁸ Potential prison sentences depend on the offense charged. However, if an HIV-positive person violates this “sexual penetration” law on multiple occasions, consecutive sentencing is possible.³⁹⁹

The statute provides that communicable diseases (i.e., HIV) may not be transmitted by engaging in behavior that has been “demonstrated to be a mode of direct transmission.”⁴⁰⁰ A “communicable disease” is defined as a disease or condition that causes serious illness, serious disability or death, or the infectious agent of which (i.e., HIV) may pass or be carried from the body of one person to the body of another through direct transmission.⁴⁰¹ “Direct transmission” means predominately sexual or blood-borne transmission.⁴⁰² Transferring a communicable disease is defined as engaging in behavior that has been “demonstrated epidemiologically to be a mode of direct transmission” of the

³⁸⁹ MINN. STAT. § 609.2241(2)(1) (2009); *See also* MINN. STAT. § 609.2241(1)(d) (2009) (defining “transfer” as engaging in “behavior that has been demonstrated epidemiologically to be a mode of direct transmission of an infectious agent which causes the communicable disease”); MINN. STAT. § 609.2241(1)(a) (2009) (defining “communicable disease” as “a disease or condition that causes serious illness, serious disability, or death; the infectious agent of which may pass or be carried from the body of one person to the body of another through direct transmission”); MINN. STAT. § 609.2241(1)(b) (2009) (defining “direct transmission” as predominately sexual or blood-borne transmission).

³⁹⁰ MINN. STAT. § 609.221 (2009).

³⁹¹ § 609.222.

³⁹² § 609.223.

³⁹³ § 609.2231.

³⁹⁴ § 609.224.

³⁹⁵ § 609.17.

³⁹⁶ § 609.185.

³⁹⁷ § 609.19.

³⁹⁸ § 609.17.

³⁹⁹ *See* Appendix to Minnesota Sentencing Guidelines at MINN. STAT. ch. 244 App. VI.

⁴⁰⁰ MINN. STAT. § 609.2241(1)(b)(2009).

⁴⁰¹ § 609.2241(1)(a).

⁴⁰² § 609.2241(1)(b).

disease.⁴⁰³ The statute is limited to only prosecuting sexual activities that are known to HIV, including sexual and anal intercourses.⁴⁰⁴

Neither the intent to transmit HIV nor actual transmission is required for prosecution.⁴⁰⁵

Under the terms of this statute, any individual who is (1) advised that she/he is HIV-positive by a physical or health official, (2) receives educational materials about how HIV is transmitted, and is (3) instructed how to prevent HIV transmission, “knowingly harbors an infectious agent.”⁴⁰⁶

It is a defense to prosecution under this statute if condoms, dental dams, or other latex barriers are used during sexual intercourse.⁴⁰⁷ It is also a defense if HIV status is disclosed to sexual partners.⁴⁰⁸ However, it should be noted that the disclosure of HIV status or the use of condoms or other protection during private, sexual activities may be difficult to prove without witnesses or document. The statute also holds that an HIV-positive individual prosecuted under this “knowing transfer” law may have a defense to prosecution if she/he can prove that she/he took practical means to prevent HIV transmission as advised by a doctor or health care professional.⁴⁰⁹

In March 2010, a 28-year old, HIV-positive man was charged with third-degree assault after he engaged in sexual intercourse with two men without disclosing his HIV status.⁴¹⁰ At least one of the men tested positive for HIV but such information is not relevant to the prosecution.⁴¹¹ In October 2009, an HIV-positive man pleaded guilty to intentionally inflicting or attempting to inflict bodily harm on another (misdemeanor assault in the fifth-degree) and was sentenced to ninety days in jail after he had unprotected sex with a woman without disclosing his HIV status.⁴¹²

HIV-positive persons are prohibited from donating their blood, organs, semen, or body tissues.

Minnesota’s “knowing transfer laws” also prohibit HIV-positive persons from transferring their blood, semen, organs, or body tissues to others.⁴¹³ This activity may be charged as assault (of the

⁴⁰³ § 609.2241(1)(d).

⁴⁰⁴ It is important to note that Minnesota’s definition of “sexual penetration” includes multiple types of activity that do not transmit HIV. (See MINN. STAT. § 609.2241(1)(e) (2009) (citing MINN. STAT. § 609.341(12) (2009), *amended by* 2010 Minn. Sess. Law Serv. Ch. 270 (S.F. 2717) (West)). This definition is cited by many other statutes (i.e., sexual assault and aggravated sexual assault statutes) and is overly broad for the purposes of the HIV exposure statute. It was probably a legislative oversight to include the entire definition of “sexual penetration” in the HIV exposure statute, as the HIV exposure statute specifically notes that only behavior known to transmit HIV may be prosecuted and the use of latex barrier protection is an affirmative defense. This suggests that it was not the intent of the legislature to prosecute sexual activities that are not known to transmit HIV and the entire definition of “sexual penetration” is not applicable to Minnesota’s HIV exposure law.

⁴⁰⁵ See MINN. STAT. § 609.2241(1)(d).

⁴⁰⁶ See MINN. STAT. § 609.2241(1)(c) (2009).

⁴⁰⁷ MINN. STAT. § 609.2241(1)(e).

⁴⁰⁸ MINN. STAT. § 609.2241(2)(1).

⁴⁰⁹ MINN. STAT. § 609.2241(3) (2009).

⁴¹⁰ Vince Tuss, *Assault Charged in HIV Case*, STAR TRIB. (Minneapolis), Mar. 25, 2010, at 1B.

⁴¹¹ *Id.*

⁴¹² *Man Sentenced for HIV Exposure*, PIONEER PRESS (St. Paul), Oct. 28, 2009; *See also Minnesota Man Receives 90 days in Jail for Exposing Woman to HIV*, POZ, Oct. 28, 2009, http://www.poz.com/articles/duluth_hiv_exposure_1_17491.shtml.

⁴¹³ MINN. STAT. § 609.2241(2)(2).

first,⁴¹⁴ second⁴¹⁵, third,⁴¹⁶ fourth,⁴¹⁷ and fifth⁴¹⁸ degrees), attempted assault,⁴¹⁹ murder (first⁴²⁰ or second degree⁴²¹), or attempted murder.⁴²² Although sentences will depend on which offense is charged, consecutive sentencing is possible if an individual violates this law on multiple occasions.⁴²³ The intent to transmit HIV nor actual transmission is required for prosecution.

Prosecution will not result if (1) the transfer of blood, semen, organ, or tissue was deemed necessary for medical research, or (2) HIV-positive individuals disclose their HIV status on donation forms before transferring these bodily fluids and tissues.⁴²⁴

Sharing needles or syringes may lead to criminal penalties.

It is unlawful for a person who is HIV-positive to transfer the virus to another by sharing non-sterile needles/syringes for the purpose of injecting drugs.⁴²⁵ Under Minnesota sentencing laws, consecutive sentencing is possible if an HIV-positive person shares a needle/syringe on multiple occasions.⁴²⁶

Although disclosing HIV status to sexual partners may prevent prosecution in Minnesota, on the face of the statute it is not a defense if HIV status is disclosed before sharing needles with another. Prosecution for HIV exposure may result even if an HIV-positive person shares a needle with another individual fully aware of her/his HIV status and understands the risk to HIV exposure.

Neither the intent to transmit HIV nor actual transmission is required for prosecution.

HIV-positive status results in enhanced prison sentences for sex offenses.

Under Minnesota sentencing guidelines, a defendant may receive a sentence higher than what is recommended if aggravating circumstances make her/his conduct more serious than the conduct normally involved in the commission of the offense.⁴²⁷ A defendant's exposure of sexual assault victims to sexually transmitted infections (STI) or HIV has been used as a justification for elevated

⁴¹⁴ § 609.221(2009).

⁴¹⁵ § 609.222.

⁴¹⁶ § 609.223.

⁴¹⁷ § 609.2231.

⁴¹⁸ § 609.224.

⁴¹⁹ § 609.17.

⁴²⁰ § 609.185.

⁴²¹ § 609.19.

⁴²² § 609.17.

⁴²³ See MINN. SENTENCING GUIDELINES app. (2009), available at MINN. STAT. ch. 244 App. VI.

⁴²⁴ MINN. STAT. § 609.2241(2)(2)(2009).

⁴²⁵ § 609.2241(2)(3).

⁴²⁶ See Appendix to Minnesota Sentencing Guidelines at MINN. STAT. ch. 244 App. VI.

⁴²⁷ See MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY (2010), <http://www.msgc.state.mn.us/guidelines/guide10.pdf>, at 28-35.

prison sentences.⁴²⁸ In *State v. Vance*, a man who sexually assaulted a 16-year-old girl received a prison sentence twenty-nine months higher than usual due to (1) his victim's young age, and (2) the fact that he infected her with both venereal warts and pubic lice.⁴²⁹ In *Perkins v. State*, a man with AIDS received the statutory maximum of thirty years in prison for a sexual assault (three times higher than the sentence recommended by guidelines).⁴³⁰

HIV-positive criminal defendants may receive enhanced sentences regardless of whether they transmit HIV to sexual assault victims. At the time of trial in *Perkins*, it was not made public whether or not the woman involved was infected with HIV, but such facts were not necessary for the enhanced sentencing.⁴³¹ The trial judge who sentenced the HIV-positive man remarked that he could not “fathom on the face of this earth if there was a more devastating offense to a victim than being sexually assaulted by a person with AIDS. The victim of this offense will not know for several months whether or not she contracted the HIV virus.”⁴³²

Note on civil commitment: Under the “civil commitment” laws of Minnesota, an individual found to be “sexually dangerous,” a “sexual psychopathic,” or “mentally ill and dangerous” can be indefinitely confined by the state to protect the public safety.⁴³³ New York State has attempted to use a similar law to impose further punishments for HIV exposure (*See* New York). In 2008, a civil commitment proceeding was initiated against an HIV-positive man in *In re Renz*.⁴³⁴ Renz appealed his commitment for being “mentally ill and dangerous,” arguing that though he is mentally ill he is not dangerous and his commitment should only be for his mental illness.⁴³⁵ To be confined as “mentally ill and dangerous,” in addition to having a mental illness, the person must present a “clear danger to the safety of others” because she/he has “engaged in an over act causing or attempting to cause serious physical harm to another” and there is a “substantial likelihood that the person will engage in acts capable of inflicting serious harm on another.”⁴³⁶ Renz contended that there was no clear and convincing evidence that he engaged in any act causing or attempting to cause physical harm to another.

⁴²⁸ *See* *Kilcoyne v. State*, 344 N.W.2d 394, 397 (Minn. 1984) (viewing defendant's transmission of trichomonas vaginalis to sexual assault victim as an aggravating factor justifying elevated sentencing); *State v. Taylor*, No. C3-88-74, 1988 WL 75555 (Minn. Ct. App. June 26, 1998) (unpublished) (affirming an elevated sentence based partly on defendant's transmission of gardnerella to victim); *State v. Banks*, No. C1-94-1491, 1995 WL 118922, at *2 (Minn. Ct. App. Mar. 21, 1995) (unpublished) (viewing the transmission of venereal disease to a sexual assault victim as an aggravating factor during sentencing).

⁴²⁹ *State v. Vance*, 392 N.W.2d 679, 684 (Minn. Ct. App. 1986).

⁴³⁰ *Perkins v. State*, 559 N.W.2d 678, 683-85 (Minn. 1997); *see also* *State v. Sebasky*, 547 N.W.2d 93, 100-101 (affirming a triple departure from the recommended sentence for criminal sexual conduct where defendant knew he was HIV-positive while sexually abusing two boys), *denial of post-conviction relief affirmed by* *Sebasky v. State*, No. A05-507, 2006 WL 463619 at *1 (Minn. Ct. App. Feb. 28, 2006).

⁴³¹ *Perkins*, 559 N.W.2d at 682, 684.

⁴³² *Id.* at 684.

⁴³³ MINN. STAT. § 253B.185 (2007), *amended by* 2010 Minn. Sess. Law Serv. Ch. 300 (S.F. 2713), Ch. 357 (H.F. 2612), Ch. 385 (H.F. 3787).

⁴³⁴ *In re Renz*, No. A08-898, 2008 WL 4706962 (Minn. Ct. App. 2008).

⁴³⁵ There are stark differences between being committed for being “mentally ill” versus commitment for “mentally ill and dangerous.” This includes the place and duration of commitment as well as the procedures for being discharged. *See* MINN. STAT. §§ 253B.09, 253B.18 (2006).

⁴³⁶ MINN. STAT. § 253B.02(17) (2006).

The court held that because Renz knew his HIV status and engaged in unprotected, undisclosed sex with his partners, such activity was a danger to others. The court reasoned that because of Renz's history of unprotected sex, as evidenced by his contracting gonorrhea and syphilis, he presented a danger despite the fact that there was no evidence of a specific person or instance of such sexual conduct. The court also noted that though earlier case law held that any commitment of an HIV-positive person who intended to have sexual intercourse with others without advising them of his HIV status had to be addressed by the Health Threat Procedures Act rather than civil commitment,⁴³⁷ one's HIV status would not preclude civil commitment if other requirements of the law were met. Here, the court found that due to Renz's sexual history, he met the requirements for commitment as mentally ill and dangerous.

Note on coercion: Under Minnesota victims' rights laws, any individual coerced into sex work by another person may pursue a civil action against that person.⁴³⁸ Evidence of "coercion" may include "exploiting HIV status, particularly where the defendant's previous coercion led to the HIV exposure."⁴³⁹

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

⁴³⁷ *In re Stilinovich*, 479 N.W.2d 731, 735-36 (Minn. Ct. App. 1992) (finding the use of Minnesota's "psychopathic personality" statute inappropriate for civil commitment where HIV-positive defendant failed to show concern for the risk of HIV transmission through sexual intercourse). *In re Stilinovich* pre-dates Minnesota's HIV exposure and "sexually dangerous person" laws.

⁴³⁸ MINN. STAT. § 611A.81 (2009).

⁴³⁹ § 611A.80(2)(22).

Mississippi Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MISS. CODE ANN. § 97-27-14(1)*****Exposure to HIV, hepatitis B, or hepatitis C***

It shall be a felony for any person to knowingly expose another person to HIV, hepatitis B, or hepatitis C. Prior knowledge and willing consent to the exposure is a defense to a charge brought under this statute.

MISS. CODE ANN. § 97-27-14(2)***Endangerment by bodily substance with knowledge of HIV status***

A person commits the crime of endangerment by bodily substance if the person attempts to cause or knowingly causes a corrections employee, a visitor to a correctional facility, or another prisoner or offender to come into contact with blood, seminal fluid, urine, feces, or saliva. A violation of this subsection is a misdemeanor unless the person violating this section knows that he is infected with HIV, hepatitis B, or hepatitis C, in which case it is a felony.

MISS. CODE ANN. § 97-27-14(3)***Penalties for felony HIV exposure or endangerment by bodily fluids***

Any person convicted of a felony violation of this section shall be imprisoned for not less than three years nor more than ten years and/or a fine of not more than \$10,000.

MISS. CODE ANN. § 41-23-2***Violating the lawful order of a health officer***

Any person who shall knowingly and willfully violate the lawful order of the county, district or state health officer where that person is afflicted with a life-threatening communicable disease or the causative agent thereof shall be guilty of a felony and, upon conviction, shall be punished by a fine not exceeding \$5,000 or by imprisonment in the penitentiary for not more than five years, or both.

A broad range of HIV exposures may result in imprisonment.

In Mississippi, it is a felony punishable by up to ten years in prison and/or a \$10,000 fine if an HIV-

positive person knowingly exposes another to HIV.⁴⁴⁰

Neither the intent to transmit HIV nor actual transmission is required for conviction.

It is a defense to prosecution if the complainant (1) is aware of the other's HIV status and (2) willingly consents to HIV exposure. Disclosure is a complete defense in Mississippi; however, proving disclosure of HIV status during private, sexual encounters is difficult without witnesses or documentation. Whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another.

The only prosecution on record for HIV exposure in Mississippi occurred in October 2008, when a 28-year-old wife pleaded guilty to knowingly exposing her husband to HIV after she failed to tell him that she was HIV-positive.⁴⁴¹ The woman allegedly knew she was HIV-positive since 1997, but never told her husband, whom she married in 2003. Under the terms of her plea agreement, she received a ten-year prison sentence, with nine years suspended and one year to be served under house arrest. Neither the woman's ex-husband nor her five-year-old son tested positive for HIV though such facts play no role in a prosecution.

Exposing prisoners, prison guards, or prison visitors to bodily fluids is prohibited.

Mississippi's HIV statute specifically targets HIV-positive inmates who throw or otherwise expose others to their bodily fluids during confrontations. It is a misdemeanor punishable by up to one year in jail and/or a \$1,000 fine⁴⁴² if a person attempts to cause or knowingly causes a corrections employee, visitor to a correctional facility, or fellow prisoner or offender to come into contact with her/his blood, seminal fluid, urine, feces, or saliva.⁴⁴³ A violation of this law becomes a felony, punishable by up to ten years in prison and/or a \$10,000 fine,⁴⁴⁴ if an individual convicted knew that she/he was HIV-positive.⁴⁴⁵

This "bodily substance" statute may cover a large class of persons beyond prisoners and prison guards. Under the terms of this statute, "offenders" include anyone in the custody of the department of corrections and "prisoners" include anyone confined in a city or county jail.⁴⁴⁶ "Corrections employees" include any employee of an agency or department responsible for operating a jail, prison, or correctional facility, or anyone working in these facilities.⁴⁴⁷ Exposing visitors to these facilities is also criminalized.⁴⁴⁸

Neither the intent to transmit HIV nor actual transmission is required.

⁴⁴⁰ MISS. CODE ANN. § 97-27-14(1) (West 2010).

⁴⁴¹ Nicklaus Lovelady, *Wife Gets House Arrest in HIV Case*, CLARION LEDGER, Oct. 7, 2008 at 1B.

⁴⁴² MISS. CODE ANN. § 97-27-14(4) (West 2010).

⁴⁴³ § 97-27-14(2).

⁴⁴⁴ § 97-27-14(3).

⁴⁴⁵ § 97-27-14(2)(c).

⁴⁴⁶ § 97-27-14(2)(b)(ii)-(iii).

⁴⁴⁷ § 97-27-14(2)(b)(i).

⁴⁴⁸ § 97-27-14(2)(a).

This statute imposes additional fines and prison sentences for offenders who are HIV-positive, regardless of whether they expose others to a risk of HIV infection. An HIV-positive offender will serve up to ten times more prison time than an HIV-negative offender, even if the “bodily substance” in question is urine, feces, or saliva, which pose only theoretical risks of HIV infection.

Furthermore, because attempting to expose others to bodily substances is punishable, it is not a defense that these substances did not come into contact with another or that HIV transmission was impossible under the circumstances.

Violating a quarantine order of the health department is a felony.

Imprisonment may result from violating directions from the state health department. HIV-positive persons may be mandated by the health department to disclose their HIV status to sexual partners and avoid intravenous drug use.

Under the public health and quarantine laws of Mississippi, the state department of health is authorized to “investigate and control the causes of epidemic, infectious and other disease affecting the public health.”⁴⁴⁹ Part of this authority includes the power to “establish, maintain and enforce isolation and quarantine,” and “to exercise such physical control over property and individuals as the department may find necessary for the protection of the public health.”⁴⁵⁰ It is a felony, punishable by up to five years in prison and/or a \$5,000 fine, for an individual afflicted with a “life-threatening communicable disease” to willfully violate an order of the state health department issued under this authority.⁴⁵¹

Individuals living with HIV in Mississippi should be aware that this public health law has been used to prosecute at least one HIV-positive person for failing to disclose his HIV status to sexual partners.⁴⁵² In *Carter v. State*, the health department of Mississippi issued a quarantine order against an HIV-positive man and labeled him a potential danger to the public health after he tested positive for HIV.⁴⁵³ The man was ordered to (1) disclose his HIV status to sexual partners and (2) abstain from engaging in activities involving the mixture of his blood with the blood of another (i.e., intravenous drug use). The man was sentenced to five years in prison after being convicted of failing to tell a sexual partner that he was infected with HIV.

The only impetus for the defendant’s quarantine order was a positive test for HIV. Under the terms of the order, using protection during sexual intercourse was not a defense.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

⁴⁴⁹ MISS. CODE ANN. § 41-23-5 (West 2010).

⁴⁵⁰ § 41-23-5.

⁴⁵¹ MISS. CODE ANN. § 41-23-2 (West 2010).

⁴⁵² *Carter v. State*, 803 So. 2d 1191 (Miss. Ct. App. 1999).

⁴⁵³ *Id.* at 1192-93.

Missouri Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MO. REV. STAT. § 191.677*****Reckless Exposure to HIV***

It is unlawful for a person knowingly infected with HIV to:

- (1) Be or attempt to donate blood, blood products, organs, sperm, or tissue donor except as deemed necessary for medical research.
- (2) Act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person, in any of the following manners:
 - a. Through contact with blood, semen, or vaginal secretions during oral, anal, or vaginal sex; or
 - b. By sharing needles; or
 - c. By biting another person or purposely doing anything else which causes the HIV-infected person's semen, vaginal secretions, or blood to come into contact with the mucous membranes or non-intact skin of another person.

Evidence that a person has acted recklessly in creating a risk of infecting another individual with HIV shall include, but is not limited to, the following:

- The HIV-infected person knew of such infection before engaging in sexual activities, sharing needles, biting, or purposefully causing her/his semen, vaginal secretions, or blood to come into contact with the mucus membrane or non-intact skin of another person, and the [person exposed] was unaware of the HIV-infected person's condition or did not consent to contact with blood, semen, or vaginal fluid in the course of such activities;
- The HIV-infected person has subsequently been infected with and tested positive to primary and secondary syphilis, or gonorrhoea, or chlamydia; or
- Another person provides evidence of sexual contact with the HIV-infected person after a diagnosis of an HIV status.

The use of a condom is not a defense.

A violation of these provisions is a Class B felony, unless the victim contracts HIV from the contact, in which case it is a Class A felony.

MO. REV. STAT. § 565.085***Exposure to HIV in prison facilities***

An offender or prisoner commits the crime of endangering a corrections employee, a visitor to a correctional facility, or another offender or prisoner if she/he attempts to cause or knowingly causes such person to come into contact with blood, seminal fluid, urine, feces, or saliva.

It is a Class C felony if the offender has HIV, hepatitis B, or hepatitis C, or exposes another to the HIV, hepatitis B, or hepatitis C.

MO. REV. STAT. § 567.020***Prostitution while HIV-positive***

Performing an act of prostitution, which is normally a Class B misdemeanor, becomes a Class B felony if the prostitute knew prior to performing the act of prostitution that she/he was infected with HIV. The use of a condom is not a defense.

MO. REV. STAT. § 558.011***Prison sentences***

For a Class A felony, a term of imprisonment not less than ten years and not more than thirty years.

For a Class B felony, a term of imprisonment not less than five years and not more than fifteen years.

For a Class C felony, a term of imprisonment of no more than seven years.

It is a felony to fail to disclose one's HIV status to sexual partners, and condom use is not a defense.

Missouri's HIV-exposure statute makes it a felony punishable by up to fifteen years in prison, or as many as thirty years if HIV is transmitted, for an HIV-positive person who knows her/his status to recklessly expose someone, without disclosing their status, through contact with blood, semen, or vaginal secretions during oral, anal, or vaginal sex.⁴⁵⁴ Other proscribed contact includes contact of certain fluids with mucus membranes, and the sharing of needles.

⁴⁵⁴ MO. REV. STAT. §§ 558.011, 565.085 (West 2010).

The only affirmative defense under this statute is if one has disclosed her/his HIV status to sexual partners prior to engaging in sexual conduct.⁴⁵⁵ Disclosure of HIV status can be difficult to prove in court, as the only evidence available is often the word of one party against that of another.

In *State v. Yonts*, a trial court found that even if one does eventually disclose her/his HIV status to her/his sexual partner, and the parties continue to be sexually intimate after such disclosure, the HIV-positive person can still face prosecution unless the disclosure was done prior to the first sexual encounter.⁴⁵⁶ In *Yonts*, the HIV-positive defendant was sentenced to one-year imprisonment for exposing his girlfriend, the complainant, to HIV.⁴⁵⁷ Though the defendant testified that he disclosed his HIV status prior to any sexual conduct, the complainant testified it wasn't until a year into their relationship that the defendant told her he was HIV-positive.⁴⁵⁸ After the later disclosure, according from the complainant, she continued to have unprotected sex with him because she thought that the medication the defendant was taking would prevent HIV transmission – which may have been the case if he had a low viral load. The complainant did not test positive for HIV, but such facts were irrelevant to the prosecution.

It is difficult to comprehend how a jury could possibly find the defendant's actions "reckless" when the complainant still engaged in unprotected sex with full knowledge of the man's status. This case serves as a stark example of the difficulty in defending oneself against accusations of HIV exposure and proving disclosure to sexual partners under criminal HIV transmission statutes.

It is specifically noted in the statute that disclosure is the only affirmative defense to prosecution.⁴⁵⁹ Any unprotected sexual contact can be considered reckless.⁴⁶⁰ In *State v. Wilson*, the HIV-positive defendant was convicted of, amongst other charges, reckless exposure to HIV.⁴⁶¹ On appeal, the defendant argued he could not be convicted under the statute because he ejaculated outside the body and therefore did not recklessly expose the complainant's mucus membrane to HIV. The Missouri Supreme Court concluded that, "while withdrawal would have been relevant to the jury's determination of recklessness, the statute does not contemplate that withdrawal is in itself a complete defense."⁴⁶² The jury could have concluded that ejaculating outside of the body negated the element of recklessness, and thus could have acquitted, but the jury concluded that unprotected contact was reckless because it posed some possibility of transmission.

The Missouri statute has been unsuccessfully challenged for being unconstitutionally vague.⁴⁶³ In

⁴⁵⁵ *State v. Wilson*, 256 S.W.3d 58, 64 (Mo. 2008) ("The statute is unambiguous that one who knows he is HIV-positive is reckless [and subject to prosecution] if he has sexual intercourse with another without making the other person aware of his HIV status." Neither condom use nor ejaculating outside of the body is a defense).

⁴⁵⁶ 84 S.W.3d 516 (Mo. Ct. App. 2002) (appealed on the sole issue of whether trial court erred in allowing evidence of how defendant may have contracted HIV over the defense's objection. The court found that the evidence was not prejudicial enough to deprive the defendant of a fair trial).

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 518.

⁴⁵⁹ MO. REV. STAT. § 565.08(4) (West 2010).

⁴⁶⁰ *Wilson*, 256 S.W.3d at 64.

⁴⁶¹ *Wilson*, 256 S.W. 3d 58.

⁴⁶² *Id.* (the court also noted that the State had provided evidence that HIV can be transmitted by sexual fluids even if the actor withdraws prior to ejaculation).

⁴⁶³ *State v. Mahan*, 971 S.W.2d 307 (Mo. 1998).

State v. Mahan, the Missouri Supreme Court consolidated the appeals of two men who were convicted under the Missouri statute for failing to inform their sexual partners that they were HIV-positive.⁴⁶⁴ One of the men, Sykes, was sentenced to ten years imprisonment for having sex with two women, including his live-in girlfriend, and failing to disclose his HIV status. The other man, Mahan, was sentenced to five years imprisonment for failing to tell his sexual partner that he was HIV-positive.

The appellants argued that the statute was overly broad and criminalized behavior such as an HIV-positive mother giving birth to her child. The court held that the appellants lacked standing on this matter because their behavior directly fell within the language of the statute and, as such, they could not challenge hypothetical scenarios that were not reflective of their behavior. The appeal by one of the defendants, Mahan, also argued that the statute was overly vague, as the phrase “grave and unjustifiable risk” did not provide enough notice as to what acts can be prohibited under the statute. Specifically, Mahan reasoned that because the risk of transmitting HIV was not quantitatively known to scientists, a person would have no way of knowing when one’s conduct would rise to a “grave and unjustifiable risk.”⁴⁶⁵ The court found because Mahan was counseled that HIV could be transmitted through unprotected sex, including anal sex, and he continued to have anal sex without disclosing his HIV status, the statute was not vague as applied to him, and he had full notice that his actions could result in the transmission of HIV. The court upheld both of the convictions.

One notable aspect of Missouri’s law is that one can be prosecuted under this statute if, in addition to HIV, the defendant tests positive for syphilis, gonorrhea, or chlamydia.⁴⁶⁶ Positive test results for STIs are used by Missouri officials to show that HIV-positive persons are engaging in unprotected sex. This statute allows prosecutors to more easily prosecute HIV-positive persons charged with failing to tell a sexual partner about their HIV status because, as opposed to relying on facts and witness testimony, prosecutors can rely on the defendant’s medical records to prove that she/he was “recklessly” having unprotected sex and placing others at risk. This segment of the statute all but eliminates the need for complainant testimony and other evidence to prove whether or not the defendant engaged in undisclosed, “reckless” sex. This unjustly prosecutes persons based on their medical history as opposed to the facts of a case.⁴⁶⁷

The Missouri statute also provides that if a complainant tests positive for HIV and one of her/his former sexual partners is found to be HIV-positive, this would be enough to bring a charge of HIV exposure.⁴⁶⁸ Under the statute the prosecution would have to prove a sexual relationship existed between the complainant and HIV-positive defendant and that the HIV-positive defendant knew of

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 312. (It is important to note that there have been many scientific studies since *State v. Mahan* concluding that HIV has a very low rate of transmission even in the most aggravating of circumstances).

⁴⁶⁶ MO. REV. STAT. § 191.677(2)(c)(b) (West 2010).

⁴⁶⁷ The Centers for Disease Control and Prevention (CDC) have found that persons who are infected with syphilis are two-five times more likely to acquire HIV when exposed to the virus because the sores, ulcers, or breaks in skin or mucus membrane caused by syphilis break down the barriers against infection. *CDC Fact Sheet: Syphilis*, Ctr. for Disease Control and Prevention, Dec. 2007, <http://www.cdc.gov/std/syphilis/syphilis-fact-sheet.pdf>. The CDC has also found that people with gonorrhea can more easily contract and transmit HIV. *CDC Fact Sheet: Gonorrhea*, Ctr. for Disease Control and Prevention, Dec 2007, <http://www.cdc.gov/std/chlamydia/ChlamydiaFactSheet-lowres-2010.pdf>. And people with chlamydia can more easily contract HIV. *CDC Fact Sheet: Chlamydia*, Ctr. for Disease Control and Prevention, May 2010, <http://www.cdc.gov/std/chlamydia/ChlamydiaFactSheet-lowres-2010.pdf>.

⁴⁶⁸ MO. REV. STAT. § 191.677(1)(2)(c)(c) (West 2010).

her/his HIV-positive status at the time of the sexual activity.⁴⁶⁹ This statute enables prosecutions of persons where, without direct evidence as to the actual source of the infection, the defendant can face up to thirty years imprisonment for transmitting HIV.⁴⁷⁰

Other cases and prosecutions for exposing⁴⁷¹ persons to HIV in Missouri include:

- In 2004, a man pleaded guilty and was sentenced to fifteen years imprisonment for five counts of exposing his sexual partners to HIV without disclosing his HIV status.⁴⁷²
- An HIV-positive man was convicted of two counts of exposing his sexual partners to HIV and was sentenced to ten years imprisonment in addition to being convicted as a sex offender.⁴⁷³
- A man was convicted of exposing his ex-girlfriend to HIV because he failed to tell her that he was HIV-positive.⁴⁷⁴
- In 2000, an HIV-positive man was convicted of exposing his former girlfriend to HIV and was sentenced to five years imprisonment. His sentence was later suspended and he was placed on five years probation and fined \$5,000.⁴⁷⁵
- A 43-year-old man was arrested for failing to disclose his HIV status to his sexual partners.⁴⁷⁶
- In 2009, a 40-year-old HIV-positive man was charged with exposing his sexual partner to HIV after allegedly failing to disclose his HIV status.⁴⁷⁷

Sexually violent predator statutes have been applied to persons in Missouri based solely on their HIV-positive status.

In the Missouri Court of Appeals case, *In re Coffel*, an HIV-positive woman's status was the determining factor in her three-year civil confinement as a sexually violent predator.⁴⁷⁸ Missouri defines a sexually violent predator as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility and who [...] has pled guilty or been found guilty [...] of a sexually violent offense."⁴⁷⁹

⁴⁶⁹ *Id.*

⁴⁷⁰ MO. REV. STAT. §§ 191.677, 558.011 (West 2010).

⁴⁷¹ In one case an HIV-negative man was convicted of attempted murder and sentenced to life imprisonment for injecting his son with HIV-positive blood. This case did not involve a prosecution based on the defendant's HIV status, because the defendant was HIV-negative, but rather involved the prosecution of a man who tried to murder his son using HIV-positive blood. *State v. Stewart*, 18 S.W.3d 75 (Mo. Ct. App. 2000).

⁴⁷² *Spicer v. State*, 300 S.W.3d 249 (Mo. Ct. App. 2009).

⁴⁷³ *State v. Newlon*, 216 S.W.3d 180 (Mo. Ct. App. 2007).

⁴⁷⁴ *State v. White*, 247 S.W.3d 557 (Mo. Ct. App. 2007).

⁴⁷⁵ *State v. Moss*, 83 S.W.3d 604 (Mo. Ct. App. 2002).

⁴⁷⁶ *Man Charged for Knowingly Spreading HIV*, KSPR NEWS, Feb. 12, 2008, available at <http://www.kspr.com/news/local/15553847.html>.

⁴⁷⁷ *Missouri Man with HIV Charged with Reckless Sexual Contact*, KANSAS CITY STAR (MO), Sept. 23, 2009.

⁴⁷⁸ *In re Coffel*, 117 S.W.3d 116 (Mo. Ct. App. 2003).

⁴⁷⁹ Mo. Rev. Stat. § 632.480(5) (West 2010).

Coffel pleaded guilty to two counts of sodomy based on an incident that took place when she was 18-years-old. In 1994, she, on a dare, placed the penises of an 11-year-old and 13-year-old boy briefly in her mouth. When the boys discovered she was HIV-positive they reported the incident. After pleading guilty she was sentenced to five years imprisonment and though a pre-sentencing report said she was not a sexual predator, her end-of-confinement evaluation determined that due to her lack of remorse or concern about the possibility of infecting others with HIV, she was more likely than not to re-offend and should be considered a sexually violent predator.

At trial, a multidisciplinary team as well as a psychologist determined that Coffel was not a sexual predator. In particular the psychologist noted that the end-of-confinement report was based in large part on the erroneous assumption that Coffel's saliva could have transmitted HIV during the acts of sodomy, and that she intended to transmit HIV. The trial court, despite this evidence, ordered her to be confined indefinitely.

On appeal, the Missouri Court of Appeals focused on whether the state had met its burden in proving that Coffel was more likely than not to commit another sexually violent crime, as required by the sexually violent predator statute. The court found that only two out of ten of the State's witnesses addressed whether Coffel was likely to commit the crime again, and that the expert testimonies did not base their opinions on psychological theories but rather on private, subjective, untested, unsupported analysis. Based on this evidence, the court ordered Coffel's release because the state failed to meet its burden. This case highlights the extent to which a person's HIV status can be erroneously applied in civil confinement and sexually violent predator status.

Acts known not to transmit HIV, such as spitting,⁴⁸⁰ are punishable by felony penalties of five to thirty years' imprisonment.

Under Missouri's exposure statute, it is a felony to bite, or by acting purposefully in any other manner, to expose someone to the semen, vaginal secretions, or blood of an HIV-positive person.⁴⁸¹ The CDC has concluded that there exists only a "remote" possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including "severe trauma, extensive tissue damage, and the presence of blood."⁴⁸² The CDC has also concluded that spitting alone has never been shown to transmit HIV.⁴⁸³ Missouri's statute and its application ignore these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

⁴⁸⁰In most cases involving spitting individuals have been charged under the specific HIV-criminalization statute.

However, in November 2010 a man who claimed he had HIV was charged with two counts of assault for allegedly threatening and spitting on police officers. Kathryn Wall, *Man Claiming He Has HIV Charged in Assault on Officers*, NEWS-LEADER.COM, Nov. 2, 2010, <http://www.news-leader.com/article/20101102/NEWS01/11020343/Man-claiming-he-has-HIV-charged-in-assault-on-officers>.

⁴⁸¹ Mo. Rev. Stat. §§ 191.677(1)(2)(c) (West 2010).

⁴⁸² CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

⁴⁸³ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

In 2010, an HIV-positive man was charged with exposure to HIV for spitting at a police officer.⁴⁸⁴

In a case from 2004, an HIV-positive man was arrested for knowingly exposing another to HIV after he bit a police officer.⁴⁸⁵ Though the man had been intoxicated, as his blood alcohol level was twice the legal limit, and probably had no intention of transmitting HIV, the prosecutor noted that “the law doesn’t distinguish between whether he intended to give the officer HIV or not. The mere fact that he bit him constitutes reckless exposure, and he can be charged and convicted for that.”⁴⁸⁶

It is a felony to expose prison guards, prison visitors, and others prisoners to HIV through bodily fluids.

In Missouri, it is a Class D felony, punishable by up to four years in prison,⁴⁸⁷ for a HIV-negative person in confinement to attempt to cause or knowingly cause a correctional employee,⁴⁸⁸ visitor to a correctional facility, or fellow prisoner to come into contact with her/his blood, semen, urine, feces, or saliva.⁴⁸⁹ A violation of this statute becomes a Class C felony, punishable by up to seven years in prison⁴⁹⁰ if the incarcerated person is infected with HIV, hepatitis B, or hepatitis C.⁴⁹¹ Areas of confinement covered by this statute include prisons, jails, sex offender treatment centers, and any other correctional facilities.⁴⁹² Neither the intent to transmit HIV nor actual transmission is required for prosecution.

This “endangerment” statute imposes specific penalties for offenders who are HIV-positive, even if they expose others to fluids that cannot transmit HIV or *attempt* to expose others to the bodily fluids listed. It is not a defense if HIV transmission was impossible under the circumstances. This statute is not based on scientific evidence, but rather fear, stigma, and perpetual ignorance about HIV transmission.

Under this statute, there is also a risk of prosecution if a prisoner begins to bleed during a fight, and a complainant claims that he was intentionally exposed to the blood. The facts surrounding sporadic fights are hard to determine, and because juries often consider the testimony of HIV-positive criminal defendants less credible than an HIV-negative complainant regarding HIV exposure, this statute has the potential of imposing additional prison sentences for HIV-positive inmates who accidentally and unintentionally expose others to their blood due to an injury sustained during a fight.

⁴⁸⁴ *Seymour Man Charged with Recklessly Exposing Someone to HIV*, KSPR NEWS, June 1, 2010, <http://www.kspr.com/news/local/95346789.html>

⁴⁸⁵ *Man Accused of HIV Exposure*, KANSAS CITY STAR (MO), June 11, 2004, at B4.

⁴⁸⁶ *Id.*

⁴⁸⁷ MO. ANN. STAT. § 558.011 (West 2010).

⁴⁸⁸ A “correctional employee” receiving protection under this statute includes any person who is an employee of any department or agency responsible for operating a jail, prison, correctional facility, or sex offender treatment center or any person assigned to work in these locations. MO. ANN. STAT. § 565.085(2)(1) (West 2010).

⁴⁸⁹ MO. ANN. STAT. § 565.085 (West 2010).

⁴⁹⁰ § 558.011.

⁴⁹¹ § 558.011(3).

⁴⁹² § 565.085.

HIV-positive persons face potential criminal penalties if they donate blood, organs, semen, or tissue unless such donation is for medical research.

It is a Class B felony, carrying a sentence of five to fifteen years, for an HIV-positive person to donate any blood, blood products, organs, sperm or tissue, unless the donation is for medical research.⁴⁹³

It is a felony for an HIV-positive person to share needles and not disclose one's HIV status.

If HIV-positive persons fail to disclose their HIV status to fellow needle sharers, it is a Class B felony punishable by five to fifteen years in prison.⁴⁹⁴ However, if the complainant tests positive for HIV then the HIV-positive defendant can be sentenced to a Class A felony with the possibility of ten to thirty years' imprisonment.⁴⁹⁵

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⁴⁹³ MO. REV. STAT. §§ 191.677(1)(1), 558.011.

⁴⁹⁴ MO. REV. STAT. §§ 191.677(1)(2)(b), 558.011.

⁴⁹⁵ MO. REV. STAT. §§ 191.677(2), 558.011.

Montana Statute(s) that Allow for Criminal Prosecution based on HIV Status:**MONT. CODE. ANN. §§ 50-18-112, 50-80-113*****Violation of a Misdemeanor***

A person infected with an STD may not knowingly expose another person to infection. HIV is considered an STD for the purposes of this statute (MONT. CODE ANN. § 50-80-101).

Exposing another to an STI, including HIV, is punishable via a communicable disease control statute.

It is a misdemeanor,⁴⁹⁶ punishable by up to six months in county jail and/or a \$500 fine,⁴⁹⁷ for a person with a sexually transmitted disease to “knowingly” expose another to that disease.⁴⁹⁸ HIV is considered an STD for the purposes of this exposure law.⁴⁹⁹ Though this statute may target HIV, at the time of the manual’s publication, there has been no recorded prosecution of HIV exposure. Also, communicable disease statutes tend to go unenforced for any STI exposure, including HIV. (*See* Introduction).

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

⁴⁹⁶ MONT. CODE ANN. § 50-18-113 (1967).

⁴⁹⁷ § 46-18-212 (1973).

⁴⁹⁸ § 50-18-112 (1967).

⁴⁹⁹ § 50-18-101 (1993).

Nebraska Statute(s) that Allow for Criminal Prosecution based on HIV Status:**NEB. REV. STAT. § 28-934 (2011)*****Assault with a bodily fluid against a public safety officer; penalty; order to collect evidence***

Any person who knowingly and intentionally strikes any public safety officer with any bodily fluid is guilty of assault with a bodily fluid against a public safety officer. A person who violates this provision is guilty of a misdemeanor unless he or she knew the source of the bodily fluid was infected with the human immunodeficiency virus, hepatitis B, or hepatitis C at the time the offense was committed, making the violation a Class IIIA felony punishable by a maximum term of imprisonment of not more than 5 years, or by a fine of not more than \$10,000, or by both fine and imprisonment.

Upon a showing of probable cause that such an offense has been committed, a judge shall grant a court order or search warrant authorizing the collection of medical test results or medical records and may authorize tests to determine the presence of human immunodeficiency virus, hepatitis B, or hepatitis C.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Nevada Statute(s) that Allow for Criminal Prosecution based on HIV Status:

NEV. REV. STAT. § 201.205***Intentional transmission of HIV: penalty and affirmative defense***

A person who, after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and, receiving actual notice of that fact, intentionally, knowingly, or willfully engages in conduct in a manner that is intended or likely to transmit the disease to another person is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment.

It is an affirmative defense to an offense charged if the person who was subject to exposure to the human immunodeficiency virus as a result of the prohibited conduct: knew the defendant was infected with the human immunodeficiency virus; knew the conduct could result in exposure to the human immunodeficiency virus; and consented to engage in the conduct with that knowledge.

NEV. REV. STAT. § 201.358***Engaging in prostitution or solicitation for prostitution after testing positive for exposure to human immunodeficiency virus***

A person who works as a prostitute in a licensed house of prostitution after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiving notice of that fact is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment.

NEV. REV. STAT. § 441A.300***Confinement of a Person Whose Conduct May Spread Acquired Immunodeficiency Syndrome***

A person who is diagnosed as having acquired immunodeficiency syndrome who fails to comply with a written order of a health authority, or who engages in behavior through which the disease may be spread to others, is, in addition to any other penalty imposed pursuant to this chapter, subject to confinement by order of a court of competent jurisdiction.

NEV. REV. STAT. § 441A.180***Contagious person to prevent exposure to others; warning by health authority; penalty***

A person who has a communicable disease in an infectious state shall not conduct herself /himself in any manner likely to expose others to the disease or engage in any occupation in which it is likely that the disease will be transmitted to others. A person who violates this provision after service upon her/him of a warning from a health authority is guilty of a misdemeanor.

HIV-positive persons are prohibited from engaging in conduct known to transmit HIV.

In Nevada, it is a Class B felony, punishable by two to ten years in prison and/or a fine of up to \$10,000, for a person who knows she/he is HIV-positive to intentionally engage in conduct that is intended or likely to transmit the disease to another person. Actual transmission of HIV is not required under the statute.

Though the statute is entitled “intentional transmission” of HIV, neither intent to expose another to HIV nor transmission is required. A person must only engage in conduct “likely to transmit HIV” regardless of any specific intent to expose another person to HIV. Conduct “likely to transmit” HIV is not defined under the statute.

Nevada law provides an affirmative defense to the intentional transmission of HIV if the other person who was subject to possible HIV exposure knew the defendant was HIV-positive, knew that the conduct in which they were engaging could lead to HIV exposure, and voluntarily engaged in the conduct. This most likely applies to sexual activities or needle sharing, although the statute does not explicitly define such conduct. At a minimum, disclosure must occur prior to engaging in any acts known to transmit HIV. It may be difficult to prove whether one’s HIV status was disclosed in the course of private sexual activities, because whether or not disclosure actually occurred is often open to interpretation and always depends on the words of one person against another. Condom use without disclosure is not a defense to prosecution.

In June 2010, in what appears to be a case of first impression⁵⁰⁰ under the statute, two men were charged with felony intentional transmission of HIV for engaging in sex with an HIV-negative man whom they had met on Adam4Adam, a male dating website.⁵⁰¹ One of the defendant’s, who has an undetectable viral load, HIV status was prominently displayed on his dating profile, and he

⁵⁰⁰ Prior to this incident, at least one case held that a person’s HIV status is relevant to whether there was consent during sexual intercourse. In *Shelton v. State*, the court held that the defendant’s HIV status was relevant for determining whether the complainant in the case had agreed to engage in unprotected oral sex. 2009 WL 1490929 (Nev. 2009). The defendant was convicted of first-degree kidnapping, sexual assault of a minor under 16 years of age, battery with the intent to commit sexual assault of a minor under 16 years of age, and the use of a minor in the production of pornography.

⁵⁰¹ Interview with defendant and his attorney, names have been omitted to protect the identities of the parties (Nov. 11, 2010).

maintains that the claimant was fully aware of his HIV status. In exchange for a guilty plea, the felony charges were reduced to gross misdemeanor charges for intentional transmission of HIV, carrying a maximum sentence of one year in county jail.

Engaging in acts of prostitution while HIV-positive can result in felony charges.

Nevada is the only state that has legalized prostitution, and it is a misdemeanor for anyone to engage in prostitution except in a licensed “house of prostitution.”⁵⁰² As prostitution is regulated, sex workers must be tested monthly for HIV and STIs and are required to wear latex condoms.⁵⁰³ In Nevada, it is a Class B felony, punishable by two to ten years in prison and/or a fine of up to \$10,000, for an HIV-positive sex worker to engage in licensed or unlicensed sex work after knowledge of his/her HIV-positive status.

In *Glegola v. State*, the Nevada Supreme Court affirmed a sex worker’s conviction and fifteen-year sentence for solicitation while being HIV-positive, even though she testified that she did not actually intend to perform any sexual acts and did not engage in any activities that could transmit HIV.⁵⁰⁴ The defendant testified that her only intent was to steal the undercover agent’s money, without engaging in any sexual activities, and she should therefore not be prosecuted under the statute. No sexual act was committed, and she was taken into custody after offering sexual services. She produced multiple witnesses to testify to such facts on her behalf. The defendant also argued that her fifteen-year sentence⁵⁰⁵ was cruel and unusual punishment and disproportionate to the crime for which she was convicted. The court found that both the conviction and sentencing were appropriate because the “harm threatened by the act of solicitation of prostitution while HIV-positive is great.”⁵⁰⁶ The “legislature did not intend for the unsuspecting client to be fatally infected [...] [and as such] her crime should be treated differently [as] it is much more serious and obviously much more deadly than an ordinary crime of mere solicitation defined as a misdemeanor.”⁵⁰⁷

Such severe sentences may create an incentive for unlicensed prostitutes (who are not mandated by the state to do monthly HIV testing) to avoid being tested for HIV. If unlicensed prostitutes continue to work without knowledge of their HIV status they, at worst, face a misdemeanor conviction for being unlicensed carrying a sentence of no more than six months. However, if they continue to work knowing their positive HIV status, they can face felony penalties of up to ten years imprisonment.

Nevada also imposes penalties on HIV-positive persons for failing to comply with health authorities.

An HIV-positive person who ignores or fails to comply with orders from health authorities, and engages in behavior known to transmit HIV, may be subject to confinement and criminal

⁵⁰² NEV. REV. STAT. § 244.345 (West 2010).

⁵⁰³ NEV. ADMIN. CODE § 441A.800-815 (2010).

⁵⁰⁴ 871 P.2d 950 (Nev. 1994).

⁵⁰⁵ Since the decision in *Glegola*, the penalties for violating Nev. Rev. Stat. § 201.358 have been revised, decreasing the maximum sentence to ten years from fifteen years.

⁵⁰⁶ *Glegola v. State*, 81 P.2d at 953.

⁵⁰⁷ *Id.*

penalties.⁵⁰⁸ There are no records of a person being subject to prosecution or penalties under this statute.

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⁵⁰⁸ NEV. REV. STAT. § 441A.300 (1989).

New Hampshire Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute criminalizing HIV exposure but prosecutions have arisen under general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in New Hampshire. However, there has been at least one prosecution for HIV exposure under the state's general criminal laws.

In the 2002 case *State v. CJ*, the New Hampshire Superior Court held that exposure to HIV could be prosecuted under the state's assault and reckless conduct statutes.⁵⁰⁹ The defendant was an HIV-positive man who did not disclose his HIV status to his girlfriend before they engaged in unprotected sexual activities, and only disclosed his status after the relationship had ended and she was pregnant. On these facts, the defendant was charged with second-degree assault for recklessly causing serious psychological injuries to his former girlfriend and with four counts of reckless conduct for four other occasions that they engaged in unprotected sex.⁵¹⁰ The defendant moved to dismiss the charges, arguing that because New Hampshire had no law specifically criminalizing exposure to HIV, then the legislature must not have intended to criminalize acts known to transmit HIV.

The Court held that the seminal fluid and sexual organs of an HIV-positive person are objectively capable of causing serious bodily injury and/or death and as such should be considered a "deadly weapon" for the purposes of the state's assault and reckless conduct statutes when the activities involve unprotected sex. The Court found that the conduct the defendant allegedly engaged in was capable of inflicting bodily harm or death due to the nature of HIV, and how it is transmitted. The defendant's motion to dismiss was denied and the case was ordered to be sent to a jury for trial. Though there is no law specifically targeting HIV exposure, HIV-positive persons should disclose their status and/or wear condoms or other protection during sex.

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⁵⁰⁹ *State v. CJ*, No. 01-S-726, 2002 WL 31059244, at *1 (N.H. Super. Ct. May 23, 2002).

⁵¹⁰ *Id.* See also N.H. REV. STAT. ANN. § 631:2(B) (2010); N.H. REV. STAT. ANN. § 631:3 (2010).

New Jersey Statute(s) that Allow for Criminal Prosecution based on HIV Status:**N.J. STAT. ANN. § 2C: 34-5*****Diseased person committing act of sexual penetration***

A person is guilty of a crime of the third degree if, knowing that she/he is infected with HIV, she/he commits an act of sexual penetration without the informed consent of the other person.

N.J. STAT. ANN. §§ 2C:43-6; 2C:43-3***Sentence for imprisonment of a crime: Third Degree***

A crime of the third degree shall be punishable between three and five years imprisonment and/or a maximum fine of \$15,000.

An HIV-positive person must disclose her/his status to sexual partners.

In New Jersey a person who knows that she/he is HIV-positive may be criminally liable for a crime punishable by up to five years in prison and/or up to a \$15,000 fine for having sex with another person without disclosing her/his HIV status.⁵¹¹ Neither intent nor actual transmission of HIV is necessary for conviction.

In March 2010, a twenty-year-old, HIV-positive man was charged under New Jersey's diseased persons statute for having sexual relations with two women without disclosing his HIV status.⁵¹² It is not known whether either woman tested positive for HIV, but such facts are irrelevant to prosecution.

HIV-positive persons have been prosecuted under general criminal laws, including attempted murder, in HIV exposure cases.

In *State v. Smith*, the New Jersey Superior Court Appellate Division upheld the conviction and twenty-five-year sentence of an HIV-positive inmate who was found guilty of attempted murder, aggravated assault, and terrorist threats for biting a corrections officer.⁵¹³ The correctional officer did not test positive for HIV, but that was not relevant to the prosecution. The court acknowledged

⁵¹¹ N.J. STAT. ANN. § 2C: 34-5 (1997).

⁵¹² Michael Buck, *HIV-positive Man Charged with Second Sex Crime in Hunterdon County*, LEHIGH VALLEY LIVE, Mar. 10, 2010, http://www.lehighvalleylive.com/hunterdon-county/express-times/index.ssf/2010/03/hiv-positive_man_charged_with.html.

⁵¹³ 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993). This case was tried prior to New Jersey's diseased person's statute amended in 1997 to include HIV.

that there was only a theoretical possibility that HIV is transmitted through biting or saliva, but the conviction was upheld because the defendant subjectively believed he could cause the death of the corrections officer and intended to do so.⁵¹⁴

The defendant offered evidence at trial and on his appeal that he knew that HIV could not be transmitted through biting because he had been counseled on the matter from various health professionals, and therefore, his threats were only made to take “advantage of the ignorance and fears of his jailors.”⁵¹⁵ The court discounted this evidence and instead relied upon the threats the defendant made to the correctional officer as sufficient evidence that the defendant subjectively believed that HIV could be transmitted via a bite and saliva, and therefore intended to infect the correctional officer with HIV. Although such transmission would have been impossible, impossibility is not a defense under New Jersey law.⁵¹⁶

In 1994, a 17-year-old woman was charged as an adult on charges of attempted murder and aggravated assault for biting a juvenile detention officer, with the possible sentence of twenty-five years imprisonment.⁵¹⁷ At the time of the indictment, it was not confirmed if the girl had tested positive for HIV, only that “she believ[ed]” she had HIV.

In another case, the New Jersey Superior Court Law Division found that a hypodermic needle purportedly infected with HIV is a deadly weapon.⁵¹⁸ A deadly weapon is defined as an object “which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury.”⁵¹⁹

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⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at 511-14.

⁵¹⁶ *Id.* at 511.

⁵¹⁷ Joseph F. Sullivan, *Girl Who Thinks She has AIDS to Stand Trial for Biting of Guard*, N.Y. TIMES, Aug. 31, 1994, at B6. This case also occurred prior to New Jersey amending its diseased person’s statute.

⁵¹⁸ *State v. Ainis*, 721 A.2d 329 (N.J. Super. Ct. Law Div. 1998).

⁵¹⁹ *Id.* at 331.

New Mexico Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute

There are no statutes explicitly criminalizing HIV transmission or exposure in New Mexico. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault.

At the time of this publication, the only criminal prosecution that the authors were aware of was that of an HIV-positive woman was charged with battery for licking the cheek and mouth of a police officer.⁵²⁰ The news article did not make clear whether the battery charge was based off of the woman's HIV status.

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⁵²⁰ *Woman Charged for Licking Officer*, ALBUQUERQUE JOURNAL, Aug. 17 1998, at B8.

New York Statute(s) that Allow for Criminal Prosecution based on HIV Status:

NY PUB. HEALTH LAW § 2307 provides that someone who knows that she/he is infected with an “infectious venereal disease” and has sexual intercourse with another is guilty of a misdemeanor. But there is no indication in New York statutes that HIV infection is considered a “venereal disease.”

New York law is not defined on whether there are criminal penalties for HIV exposure.

In New York, a person who is aware that she/he is living with an infectious venereal disease may be guilty of a misdemeanor if she/he has sexual intercourse with another person. HIV is not identified as an infectious venereal disease under this statute, but there is nothing preventing its inclusion. Neither the intent to transmit nor actual transmission of HIV is necessary for a conviction. The statute provides no indication of whether disclosure of one’s status, consent prior to engaging in sexual activity, or using protection would be a defense under the statute.

There are no reports of prosecutions of persons with HIV under this statute.

HIV-positive persons have been prosecuted under general criminal laws.

In 1997, Nushawn Williams pleaded guilty to two counts of statutory rape and two counts of reckless endangerment and was sentenced to twelve years imprisonment.⁵²¹ The Williams case was heavily covered in the media after local public health and law enforcement officials publicized it, claiming that Williams may have transmitted HIV to numerous women in upstate New York. As Williams’ sentence was nearing completion, on April 13, 2010, New York Attorney General Andrew Cuomo sought to keep Williams in indefinite civil confinement for sex offenders under the Sex Offender Management Treatment Act of 2007.⁵²² A civil jury trial will determine whether or not he suffers from a mental abnormality and should be confined in a psychiatric facility or released under intensive supervision.

In *People v. Hawkrigg*,⁵²³ the county court denied the defendant’s motion to dismiss the indictment of charges for third-degree sodomy, reckless endangerment, and endangering the welfare of a child because there was sufficient evidence to show that defendant engaged in the acts knowing that he had AIDS and that such conduct could transmit HIV. The court found that this evidence was sufficient to support a reckless endangerment charge because reckless endangerment only requires proof that the defendant consciously disregarded a substantial and unjustifiable risk that her/his conduct would result in the transmission of HIV.

New York courts have also found that HIV can be considered a “deadly weapon.” In 2007, an HIV-positive man was found guilty of aggravated assault and sentenced to ten years in prison for biting a police officer. In that case, the judge found that the saliva of an HIV-positive person could be

⁵²¹Danny Hakim, *Cuomo Moves to Block Release of Nushawn Williams*, N.Y. TIMES, Apr. 14, 2010, at A20.

⁵²² *Id.*

⁵²³ 525 N.Y.S.2d 752 (Suffolk County Ct. 1988).

considered a “deadly weapon” for the purposes of aggravated assault, despite the fact that there is no scientific evidence to support such a claim.⁵²⁴ In another case, *People v. Nelson*,⁵²⁵ the court held that a hypodermic needle which the defendant claimed contained the AIDS virus, constituted a “dangerous instrument” under New York law.

At least one New York court has allowed access to medical records to determine a defendant’s HIV status for criminal charges. In an attempted assault and reckless endangerment case, the court granted the state’s motion to have access to the defendant’s medical records to prove whether or not she was HIV-positive for the reckless endangerment charges.⁵²⁶ The Rockland County Court found that there was a “compelling need”⁵²⁷ to disclose the defendant’s confidential HIV information, as the state needed to show whether the defendant biting the complainant created a grave risk of death or a depraved indifference to human life. Such claims could only be sustained if the defendant was HIV-positive.

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⁵²⁴ Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae in Support of Defendant-Appellant, X v. The People of New York, ___ N.Y. ___ (2010) (The identifying information has been redacted to protect the identity of the defendant. The brief can be found at <http://www.hivlawandpolicy.org/resources/view/526>).

⁵²⁵ 627 N.Y.S.2d 412 (N.Y. App. Div. 1995).

⁵²⁶ In re Gribetz, 605 N.Y.S.2d 834 (Rockland County Ct. 1994).

⁵²⁷ *Id.*

North Carolina Statute(s) that Allow for Criminal Prosecution based on HIV Status:**10A N.C. ADMIN. CODE 41A.0202*****Control measures – HIV***

Infected persons shall:

- a. refrain from sexual intercourse unless condoms are used; exercise caution when using condoms due to possible condom failure;
- b. not share needles or syringes, or any other drug-related equipment, paraphernalia, or works that may be contaminated with blood through previous use;
- c. not donate or sell blood, plasma, platelets, other blood products, semen, ova, tissues, organs, or breast milk;
- d. have a skin test for tuberculosis;
- e. notify future sexual intercourse partners of the infection;
- f. if the time of initial infection is known, notify persons who have been sexual intercourse and needle partners since the date of infection; and,
- g. if the date of initial infection is unknown, notify persons who have been sexual intercourse and needle partners for the previous year.

N.C. GEN. STAT. ANN. § 103A-144***Investigation and control measures***

All persons shall comply with control measures, including submission to examinations and tests, prescribed by the Commission subject to the limitations of G.S. 130A-148.

N.C. GEN. STAT. ANN. § 130A-25

Violation of these control measures is a misdemeanor. Special provisions related to sentencing and release apply. But no person shall be imprisoned for longer than two years. No person shall be released prior to the completion of the term of imprisonment and it has been determined that the person is no longer be a danger to the public health.

HIV exposure is prohibited under the health code and can result in incarceration.

Although there is no specific HIV-related criminal transmission statute in North Carolina, HIV is considered a communicable disease requiring compliance with health regulations and control

measures governing the spread of such a disease.⁵²⁸ A maximum of two years imprisonment may occur from violating these regulations, and individuals will not be released before the end of their sentence unless they are no longer considered a public danger by local authorities.⁵²⁹

Condoms or other protection must be used during sexual intercourse, and HIV status must be disclosed.

HIV-positive persons must notify all sexual partners that they have tested positive for HIV. If the date of infection is known, sexual or needle partners from that date forward must be notified of the individual's HIV status. Otherwise, all such partners from the year prior to testing positive for HIV must be notified.

The North Carolina regulation does not provide guidance on what activities are considered "sexual intercourse," and whether oral sex or anal sex is included in the definition. Any acts of sexual intercourse require, under the statute, the use of condoms and disclosure.

In August 2008, a 23-year-old, HIV-positive man was sentenced to thirty months of probation for having unprotected sex with numerous partners. He was later sentenced to six months of house arrest for further acts of unprotected sex.⁵³⁰

HIV-positive persons are prohibited from donating blood, organs, human tissue, semen, or breast milk.

Under North Carolina's Administrative Code, persons who are HIV-positive must not donate or sell blood, plasma, platelets, any other blood products, semen, ova, tissues, organs, or breast milk.

Sharing needles while being HIV-positive can result in criminal penalties.

North Carolina's Administrative Code prohibits individuals who are HIV-positive from sharing needles, syringes, or any other drug paraphernalia that may be contaminated with blood.

HIV-positive persons are also subject to general criminal laws in North Carolina.

In many states, including North Carolina, HIV exposure is often prosecuted under general criminal laws such as assault or reckless endangerment. In 2009, a 41-year-old, HIV-positive man was charged with assault and battery with intent to kill in North Carolina after biting his neighbor. The original simple assault and battery charge was upgraded for the sole reason that the alleged attacker was HIV-positive, despite the fact the CDC has concluded that there exists only a "remote" possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including "severe trauma, extensive tissue damage, and the

⁵²⁸ N.C. GEN. STAT. § 130A-144(f) (2010).

⁵²⁹ § 130A-25(b)-(c) (2010).

⁵³⁰ *Gay DJ Put on House Arrest for Second HIV Violation*, WRAL.COM, Oct. 21, 2008, http://www.wral.com/news/news_briefs/story/3781930/.

presence of blood.”⁵³¹ The CDC has also concluded that spitting alone has never been shown to transmit HIV.⁵³²

At least two courts have found that HIV is can be considered a “deadly weapon” for purposes of sexual assault cases. In 2005, a man was convicted of, among other charges, sexual assault with a deadly weapon inflicting serious injury and violation of control measures⁵³³ for having sex with an underage boy.⁵³⁴ The boy later tested positive for HIV but transmission is irrelevant for prosecution.⁵³⁵ In *State v. Monk*, the North Carolina Court of Appeals determined that charges of assault with deadly weapon and attempted murder, which arose from fact that defendant was HIV-positive when he sexually assaulted the minor victim, were properly joined with charges of first-degree statutory rape and taking indecent liberties with minor.⁵³⁶

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⁵³¹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted through a human bite?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

⁵³² CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission: Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm> (last visited Oct. 19, 2010).

⁵³³ The control measure charges were dismissed due to the statute of limitations. *State v. Murphy*, 612 S.E.2d 694 (N.C. Ct. App. 2005).

⁵³⁴ *State v. Murphy*, 612 S.E.2d 694 (N.C. Ct. App. 2005).

⁵³⁵ *Id.*

⁵³⁶ 511 S.E.2d 332 (N.C. Ct. App. 1999).

North Dakota Statute(s) that Allow for Criminal Prosecution based on HIV Status:**N.D. CENT. CODE § 12.1-20-17*****Transfer of body fluid that may contain the human immunodeficiency virus***

A person who, knowing that he or she has HIV, willfully transfers any of his or her body fluid to another person is guilty of a Class A felony. It is an affirmative defense that, if the transfer was by sexual activity, the activity took place between consenting adults after full disclosure of the risk of the activity and with the use of an appropriate prophylactic device. “Body fluid” means semen, blood, or vaginal secretion. “Transfer” means to engage in sexual activity by genital-genital contact, oral-genital contact, or anal-genital contact, or to permit the reuse of a hypodermic syringe, needle, or similar device without sterilization.

N.D. CENT. CODE §12.1-32-01***Classification of Offenses: Class A Felony***

A Class A felony is punishable by a maximum of twenty years imprisonment and/or a fine of \$10,000.

HIV status must be disclosed before sexual activity and condoms or other protections must be used.

In North Dakota, a person who is aware that she/he is HIV-positive may be criminally liable and face penalties of twenty years in prison and a \$10,000 fine if she/he engages in sexual activity, including penile-vaginal sex, anal sex, and oral sex, with another person without disclosing her/his status. It is an affirmative defense if the HIV-positive person disclosed her/his status and used condoms or other protection during the sexual activity.

Neither the intent nor actual transmission of HIV is necessary for a conviction under this statute. At the time of this publication there were no HIV-related prosecutions for exposure in North Dakota.

HIV-positive persons may not share needles.

In North Dakota, a person who is aware that she/he is HIV-positive may be criminally liable if she/he transfers blood or bodily fluids to another person by allowing them to use a needle or syringe previously used by the HIV-positive person without first sterilizing it. Neither actual transmission nor intent to transmit HIV is necessary for a conviction.

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information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

Ohio Statute(s) that Allow for Criminal Prosecution based on HIV Status:**OHIO REV. CODE ANN. § 2903.11*****Felonious assault***

(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn, or (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following: (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct, (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, or (3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender. ("Sexual conduct" is defined in OHIO. REV. CODE ANN. § 2903.11(E)(4)).

OHIO REV. CODE ANN. §§ 2907.24***Solicitation after positive HIV test***

No person, with knowledge that the person has tested positive for HIV, shall engage in, or solicit another person to engage in, sexual activity for hire. Violation of this statute is a felony of the third degree.

OHIO REV. CODE ANN. §2907.241***Loitering to engage in solicitation after positive HIV test***

No person who is HIV-positive, with the purpose to solicit another to engage in sexual activity for hire and while in or near a public place, shall do any of the following: beckon, stop, or attempt to stop another; engage or attempt to engage another in conversation; stop or attempt to stop the operator of a vehicle or approach a stationary vehicle; or if the offender is the operator of or a passenger in a vehicle, stop, attempt to stop, beckon to, attempt to beckon to, or entice another to approach or enter the vehicle of which the offender is the operator or in which the offender is the passenger. Violation of this statute is a fifth-degree felony.

OHIO REV. CODE ANN. §§ 2907.25***Prostitution after positive HIV test***

No person, with knowledge that the person has tested positive for HIV, shall engage in sexual activity for hire. Violation of this statute is a felony of the third degree.

OHIO REV. CODE ANN. §2921.38***Harassment by inmate***

No person, with knowledge that the person is HIV-positive and with intent to harass, annoy, threaten, or alarm another person, shall cause or attempt to cause the other person to come into contact with blood, semen, urine, feces, or another bodily substance by throwing the bodily substance at the other person, by expelling it upon the other person, or in any other manner. Violation of this statute is a third-degree felony.

OHIO REV. CODE ANN. §2927.13***Sale or donation of blood by AIDS carrier***

No person, with knowledge that she/he is HIV-positive, shall sell or donate her/his blood, plasma, or a product of her/his blood, if he or she knows or should know the blood, plasma, or product of her/his blood is being accepted for the purpose of transfusion to another individual. Violation of this statute is a felony in the fourth degree.

OHIO REV. CODE ANN. §2929.14***Prison terms***

For a felony of the second degree: two, three, four, five, six, seven, or eight years.

For a felony of the third degree: one, two, three, four, or five years.

For a felony of the fourth degree: six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

For a felony of the fifth degree: six, seven, eight, nine, ten, eleven, or twelve months.

OHIO REV. CODE ANN. §2929.14***Possible financial sanctions***

For a felony of the second degree, not more than \$15,000;

For a felony of the third degree, not more than \$10,000;

For a felony of the fourth degree, not more than \$5,000;

For a felony of the fifth degree, not more than \$2,500.

HIV-positive persons can be prosecuted for failing to disclose their HIV status to sexual partners.

Ohio's felonious assault statute specifically criminalizes failing to disclose one's HIV-positive status to sexual partners. Under this statute it is also a felony punishable by up to eight years imprisonment for engaging in sexual conduct with a person who cannot appreciate one's HIV status or engaging in such conduct with someone under the age of eighteen.

"Sexual conduct" includes penile-vaginal sex, anal sex, oral sex, and, without consent, the insertion, however slight, of any part of the body or any instrument that carries the bodily fluids of an HIV-positive person into another's vagina or anus.⁵³⁷

The only affirmative defense to prosecution is the disclosure of one's HIV status to sexual partners prior to engaging in any of the above-mentioned conduct. The disclosure must be made prior to the first initial act of such conduct and using condoms or other forms of protection is not a defense.

Neither the intent to transmit HIV nor HIV transmission is required for prosecution.

Ohio's felonious assault statute has survived constitutional challenges. In *State v. Gonzalez*,⁵³⁸ the defendant was convicted of two counts of felonious assault for failing to tell his sexual partner that he was HIV-positive. He was sentenced to sixteen years imprisonment and was required to register as a sex offender.⁵³⁸ The complainant later tested positive for HIV. At trial, there were numerous discrepancies in the parties' testimony, including whether or not Gonzalez told the complainant that he was HIV-positive prior to their sexual relationship. Gonzalez testified that the complainant asked him before they began their sexual relationship whether the rumors about him being HIV-positive were true and he confirmed that he had tested positive for HIV and insisted that they use condoms every time they had sex. The complainant, however, testified that when she confronted Gonzalez he denied his HIV status and claimed that they only used a condom once. In addition to the testimony of the defendant and complainant, the defendant had an ex-girlfriend testify that he had disclosed his HIV status to her and always insisted on using condoms.

On appeal, Gonzalez argued, among other issues, that the statute was unconstitutionally vague. He asserted that the statute did not provide enough information on what constitutes "disclosure," whether such disclosure had to be made prior to each sexual contact with the same person, or whether disclosure needed to be in writing. To survive a void for vagueness challenge the statute must be written so that a person of common intelligence can determine what conduct is prohibited and the statute must provide sufficient standards to prevent arbitrary and discriminatory enforcement. The court rejected the defendant's void for vagueness argument because the ordinary meaning of "disclose" is used in every day speech and therefore cannot be vague. The court reasoned that if an HIV-positive person disclosed her/his status once to a sexual partner then this would negate guilt for any subsequent contact the person had with that partner. Verbal disclosure was also held to be sufficient as the court reasoned it was disingenuous to suggest that written, signed, and notarized disclosure would be necessary to avoid prosecution.

⁵³⁷ OHIO REV. CODE ANN. § 2903.11(E)(4)(1996).

⁵³⁸ 796 N.E.2d 12 (Ohio Ct. App. 2003).

The court also held that thought there was a violation of the state's HIV confidentiality statutes when the prosecution failed to obtain court authorization for Gonzalez's HIV status, this was deemed "harmless error" because of the other evidence of the defendant's HIV status.

As *State v. Gonzalez* demonstrates, it is very difficult to prove disclosure in court. In many of these cases, there is no proof that an HIV-positive person disclosed her/his status and the only evidence available is the testimony of the defendant, complainant, or other witnesses.

Below are other examples of prosecutions under Ohio's felonious assault⁵³⁹ HIV exposure statute:

- In October 2010, a man was charged with felonious assault for allegedly failing to tell his wife that he was HIV-positive.⁵⁴⁰ After the man was admitted to the hospital with pneumonia his doctor allegedly threatened to tell the man's wife about his HIV status if the man didn't disclose.
- In 2010, a 51-year-old HIV-positive man pleaded guilty to felonious assault and was sentenced to five years imprisonment for failing to tell his wife that he was HIV positive.⁵⁴¹ He was originally charged with attempted murder in addition to felonious assault.⁵⁴²
- An HIV-positive man pleaded guilty for failing to disclose his HIV status to his sexual partner.⁵⁴³ He was originally sentenced to ten years imprisonment for felonious assault and for possessing cocaine.⁵⁴⁴
- In 2009, an HIV-positive man was sentenced to seven years imprisonment for failing to disclose his HIV status to his sexual partner. The man appealed his conviction arguing that he did not know his HIV status and could therefore not be convicted under the statute. The court reasoned that because the defendant had discussed his HIV-positive status with detectives, there was sufficient evidence to show that he knew his HIV status despite the fact that there was no medical record that the defendant had tested positive for HIV.⁵⁴⁵
- In 2006, an HIV-positive man was convicted of nine counts of felonious assault for exposing his sexual partner, who was under the age of 18-years-old and not his wife, to

⁵³⁹ Felonious assault statutes also apply to persons who "knowingly cause physical harm to another." OHIO REV. CODE ANN. § 2903.11(A)(1)(1996) A woman was convicted of attempted felonious assault for biting a hospital employee who was trying to restrain her. *State v. Reif-Hill*, 1998 WL 787389 (Ohio Ct. App. 1998). Prior to the assault she had told the hospital staff that she had AIDS though she did not. On appeal the court vacated the conviction and ordered the release of the defendant because the prosecution failed to prove that the defendant knowingly caused or attempted to cause serious physical harm to the victim by biting him with the intent to pass on HIV. Because the defendant did not have HIV and the victim did not contract HIV the conviction was vacated.

⁵⁴⁰ Tom Giambroni, *Husband Allegedly kept HIV a secret*, MORNING JOURNAL, Oct. 2, 2010, available at <http://www.morningjournalnews.com/page/content.detail/id/526618/Husband-allegedly-kept-HIV-a-secret.html?nav=5006>

⁵⁴¹ Gabriel Baird, *Man who gave wife AIDS gets five years in prison*, THE PLAIN DEALER, March 8 2010, available at http://blog.cleveland.com/metro/2010/03/man_who_gave_wife_aids_gets_5.html.

⁵⁴² Gabriel Baird, *Woman hopes tale can warn others after husband conceals illness*, THE PLAIN DEALER, February 28, 2010 available at http://blog.cleveland.com/metro/2010/02/oman_hopes_she_can_warn_others.html

⁵⁴³ *State v. Jones*, 2009 WL 4811329 (Ohio Ct. App. 2009).

⁵⁴⁴ *Id.* at 3.(vacating and remanding because the state failed to live up to its plea negotiations of recommending the defendant to a term of imprisonment of two to four years.).

⁵⁴⁵ *State v. Russell*, No. 09AP-226, 2009 WL 3090190 (Ohio Ct. App. Sept. 29, 2009).

HIV.⁵⁴⁶ He was sentenced to four years imprisonment and forced to register as a sex offender.⁵⁴⁷

- An HIV-positive man was sentenced to four years imprisonment for abduction and six years for felonious assault for failing to tell his sexual partner that he was HIV-positive.⁵⁴⁸ The trial court ordered that the sentences be served consecutively. On appeal, the court found that the trial court's determination of consecutive sentencing was proper because the defendant may have transmitted HIV to the complainant and because it was unclear how many other people the defendant may have exposed to HIV through unprotected sex.
- An HIV-positive man was sentenced to four years in jail under felonious assault charges for failing to tell his sexual partner that he was HIV-positive.⁵⁴⁹
- An HIV-positive man pleaded guilty to two counts of felonious assault and was sentenced to twelve years imprisonment for failing to tell his sexual partners about his HIV status.⁵⁵⁰
- In 2008, an HIV-positive man was charged with felonious assault for failing to disclose his HIV status to his sexual partner.⁵⁵¹

After being released from prison for felonious assault charges, HIV-positive persons may be subject to invasive parole and community control standards. In 2006, an HIV-positive man was sentenced to two years imprisonment for failing to tell his sexual partner that he was HIV-positive.⁵⁵² A year later he was released and put on community control for five years. As part of his community control, the defendant could "have no sexual conduct with any individual without prior approval of the court."⁵⁵³ During his community control, the defendant engaged in two sexual relationships, one with a man and one with a woman, both of whom knew of his HIV status, but only one of them (the woman) had received court approval. In the trial regarding whether the defendant had violated his community control sanctions by engaging in sexual relationship with the man without court approval the trial court found the defendant guilty and sentence him to two years imprisonment.

On appeal, the defendant argued that he did not violate the court's orders because (1) he and the man never had sex; (2) even if they had a sexual relationship the man knew about the defendant's HIV status; and (3) that it was an unconstitutional invasion of his right to privacy to require court approval for potential sex partners. The Ohio Court of Appeals was "concerned" about the breadth

⁵⁴⁶ State v. Christian, No. 07 JE 9, 2007 WL 4696853 (Ohio Ct. App. Dec. 28, 2007).

⁵⁴⁷ A sex offender is classified as someone who is convicted of or pleads guilty to a sexually oriented offense. Felonious assault, when committed with a sexual motivation is a sexually oriented offense. Ohio Rev. Code Ann. § 2950.01(G)(1)(c)(West 2010). The court in this case found that because the defendant knew he was HIV positive and engaged in sexual conduct with a person under 18 years old, who was not his spouse, such conduct had a sexual motivation and therefore was a sexual oriented offense. The court upheld the defendant's sexual offender status.

⁵⁴⁸ State v. Greiger, No. 22073, 2004 WL 3017314 (Ohio Ct. App. Dec. 22, 2004).

⁵⁴⁹ State v. Roberts, 805 N.E.2d 594 (Ohio Ct. App. 2004).

⁵⁵⁰ Tracey Reed, *Man gets 6 more years in HIV-Case*, NEWS-HERALD NEWS, Sept. 6, 2008, available at <http://news-herald.com/articles/2008/09/06/news/doc48c208d20292e286892120.txt>.

⁵⁵¹ Dana Wilson, *Man who hid HIV status charged with Assault*, COLUMBUS DISPATCH, June 30, 2008, available at http://www.dispatch.com/live/content/local_news/stories/2008/06/30/ayala_hiv.html?sid=101.

⁵⁵² State v. Eversole, 912 N.E. 2d 643 (Ohio Ct. App. 2009).

⁵⁵³ *Id.* at 644.

of the community control requiring court approval for sexual partners but found that the defendant failed to timely appeal the right to privacy issue and would therefore not address it.⁵⁵⁴ The court overruled the defendant's other issues on appeal, finding that the trial court was correct in monitoring the defendant's activities to "protect the public from the blatant disregard [the defendant] demonstrated when he failed to disclose his condition to the initial victim of his offense."⁵⁵⁵ The court held that the defendant was in violation for failing to tell the trial court about his sexual relationship with man despite the fact that the man had full knowledge of defendant's HIV status.

HIV-positive persons can face criminal penalties for prostitution and solicitation of prostitution.

It is a third-degree felony for HIV-positive persons to solicit (advertising the illegal sale of sex for hire) or encourage another to solicit prostitution.⁵⁵⁶ It is a felony in the fifth degree for an HIV-positive person to "loiter to engage in prostitution."⁵⁵⁷ For HIV-negative persons the charge is a misdemeanor in the third degree.⁵⁵⁸

A person "loiters to engage in prostitution" when a she/he tries to stop another person, engages or attempts to engage another in conversation, stops or attempts to stop the operator of a car, or approaches a stationary car with the intent to engage in sexual activity for hire while in or near a public place.⁵⁵⁹ A person can also be charged with loitering to engage in prostitution if she/he is the driver or passenger in a car and tries to do any of the aforementioned activities or entice another person to approach or enter the vehicle with the purpose of engaging in sexual activity for hire.

Under this statute it does not matter whether any sexual act was performed, if there was any possibility of transmitting HIV, or if there was an intent to transmit HIV. The mere discussion of engaging in sexual conduct for money is sufficient for prosecution. In *State v. McPherson*⁵⁶⁰, the appellant was found guilty of solicitation of prostitution while HIV-positive and was sentenced to three years imprisonment and forced to register as a sex offender. McPherson was charged when he approached an undercover officer, who knew that the McPherson was HIV-positive and had been previously arrested for solicitation. The two engaged in conversation and when McPherson agreed to perform a sexual act for \$10 he was arrested.

On appeal, the Ohio Court of Appeals addressed whether there was sufficient evidence to convict McPherson of solicitation, if McPherson knew of his HIV-positive status, and whether the trial court correctly forced him to register as a sex offender. The court found that because the defendant initiated the conversation with the undercover officer and was the first person to discuss sex and money there was enough evidence to successfully prosecute him for solicitation despite the fact that no sexual act or exchange of money had occurred. On the question of whether the defendant knew

⁵⁵⁴ *Id.* at 646.

⁵⁵⁵ *Id.* at 647.

⁵⁵⁶ OHIO REV. CODE ANN. §§ 2907.24, 2907.25 (West 2010).

⁵⁵⁷ OHIO REV. CODE ANN. § 2907.241(B) (West 2010).

⁵⁵⁸ § 2907.241(D)(1).

⁵⁵⁹ § 2907.241(A).

⁵⁶⁰ 758 N.E.2d 1198 (Ohio Ct. App. 2001).

his HIV-positive status, the court concluded that the medical records noting the defendant's status and the police department's vice squad's knowledge of the defendant's status was sufficient to prove that McPherson knew he was HIV-positive. The court reversed the finding that the defendant had to register as a "sex offender" because solicitation is not considered a sexually oriented offense.

Other examples of prosecutions for solicitation and prostitution after an HIV-positive test include:

- An HIV-positive woman was convicted of two counts of soliciting another to engage in sexual activity for hire after a positive HIV test.⁵⁶¹ She was sentenced to four years imprisonment, each charge to be served concurrently.
- In 2000, an HIV-positive man was convicted of solicitation while being HIV-positive and was sentenced to two years imprisonment.⁵⁶²
- A 25-year-old HIV-positive man was arrested for attempted solicitation of prostitution while knowing he was HIV-positive.⁵⁶³
- In 2010, an HIV-positive woman was charged with solicitation after testing positive for HIV.⁵⁶⁴
- In 2003, a woman was sentenced to two years imprisonment for solicitation after testing positive for HIV.⁵⁶⁵

HIV-positive persons face penalties for exposing others to any bodily fluid.

Under Ohio's harassment by inmate statute HIV-positive persons can face third-degree felony charges for exposing any other person to their urine, feces, saliva, blood, or any other bodily substance with the intent to annoy, threaten, alarm, or harass.⁵⁶⁶ Though the statute is named "harassment by inmate" a person does not have to be imprisoned or in confinement to be prosecuted under this statute.

HIV-positive persons face increased sentences despite the fact that many of the bodily substances at issue present no risk risks of transmitting HIV. Urine, feces, and saliva are not known transmitters of HIV but despite these facts HIV-positive persons can face five years imprisonment for exposing others to these fluids while HIV-negative persons only face a maximum of one year imprisonment. Many of the cases under this statute arise from people spitting at or throwing urine at law enforcement officials. Neither act is known to transmit HIV.

⁵⁶¹ State v. West, No. 22966, 2009 WL 4268554 (Ohio. Ct. App. Nov. 25, 2009).

⁵⁶² State v. Jones, No. 19978, 2004 WL 690419 (Ohio Ct. App. Apr. 2, 2004).

⁵⁶³ Lucas Sullivan, *HIV-Positive Man Arrested in Sting*, DAYTON DAILY NEWS (Ohio), Sept. 12, 2009, at A6.

⁵⁶⁴ John Fuddy, *Woman faces multiple counts of soliciting with HIV*, COLUMBUS DISPATCH, July 31, 2010, at B03.

⁵⁶⁵ John Fuddy, *Prostitute's HIV status overlooked in charges*, COLUMBUS DISPATCH, September 12, 2010 available at http://www.dispatch.com/live/content/local_news/stories/2010/09/12/prostitutes-hiv-status-overlooked-in-charges.html?sid=101.

⁵⁶⁶ OHIO REV. CODE ANN. §2921.38(c)(West 2010).

In *State v. Thompson*, the HIV-positive defendant was a prisoner at the Southern Ohio Correctional Facility (“SOCF”) and threw a cup full of feces at a nurse employed by SOCF.⁵⁶⁷ The feces hit her in the face, hair, arms, chest and leg. The defendant was brought before the Rules Infraction Board at SOCF was sentenced to fifteen days in disciplinary control. He was also indicted on two counts of harassment by an inmate. The defendant moved to dismiss on the grounds of double jeopardy, and the trial court overruled the motion. The defendant later pleaded no contest to one count and was sentenced to an additional nine months imprisonment.

The defendant appealed his conviction, contending that the disciplinary proceedings at the SOCF were criminal in nature, and that his subsequent conviction for harassment by an inmate violated the double jeopardy provisions of the U.S. Constitution. The appellate court sustained the defendant's conviction, finding that the legislature intended that the administrative sanctions imposed upon an inmate by prison authorities to be civil in nature and that the subsequent criminal action did not violate the Double Jeopardy Clause. If one is imprisoned and convicted under the harassment by inmate statute she/he may face penalties implemented by the prison system as well as additional sentences forced by the courts.

In *State v. Lewis*, an HIV-positive man was found guilty of nine counts of third-degree felony harassment by an inmate charges, one count of intimidation by a public servant, and was sentenced to twenty years imprisonment.⁵⁶⁸ The appellant denied he was HIV-positive and though the state produced medical records stating that the appellant had been diagnosed in 1996 those medical records had not been given to the appellant during the discovery phase of the trial. The appellant argued at trial that he needed to obtain exculpatory lab tests proving that he was HIV-negative and asked for a continuance, which was denied, to prepare this defense. On appeal the Ohio Court of Appeals found that the trial court abused its discretion by admitting the medical records on the first day of the trial before the defendant had time to prepare a defense and rebut the prosecution's assertion that he was HIV-positive. The conviction was reversed and the case remanded.

Other prosecutions and cases under the harassment by inmate statute include:

- In 2010, a 41-year-old, HIV-positive man was charged with harassment by an inmate, among other charges, for spitting in the eye of an officer after trying to break into a convenience store.⁵⁶⁹
- A 48-year-old, HIV-positive man was charged with two counts of harassment by an inmate for spitting at a police officer.⁵⁷⁰

The CDC has long maintained that saliva, urine, and feces are not means of transmitting HIV.⁵⁷¹

⁵⁶⁷ 726 N.E.2d 530 (Ohio Ct. App. 1999).

⁵⁶⁸ *State v. Lewis*, No. 07CA3137, 2008 WL 787722 (Ohio Ct. App. March 21, 2008).

⁵⁶⁹ *Akron Police Say Man Spit on Officer, Store Break-In Suspect says he's HIV positive*, AKRON BEACON JOURNAL, Feb. 17, 2010 at B10.

⁵⁷⁰ *Police: Man with AIDS Spits on Officer*, NEWS 5 WLWT.COM, Aug. 12, 2009, available at <http://www.wlwt.com/news/20368401/detail.html?taf=cin>.

⁵⁷¹ Centers for Disease Control and Prevention, *HIV Transmission* (Mar. 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

HIV-positive persons are prohibited from donating or selling blood or plasma.

It is a felony, punishable by up to eighteen months imprisonment, for an HIV-positive person to donate or sell her/his blood, plasma, or any other blood product.

HIV-positive persons have been incarcerated for using saliva as a “deadly weapon.”

Ohio’s felonious attempt statute, in addition to prosecuting persons for failing to disclose their HIV status to sexual partners, has also been used to prosecute HIV-positive persons for using their saliva or other bodily fluid as a “deadly weapon.”⁵⁷² Under the felonious assault statute, “no person shall knowingly [...] cause or attempt to cause physical harm to another or another’s unborn by means of a deadly weapon.”⁵⁷³ In multiple cases, Ohio courts have determined that any spit of an HIV-positive person containing a mixture of blood and saliva is a “deadly weapon.”

In *State v. Price*, the appellant, an HIV-positive hemophiliac, spat at and bit a police officer.⁵⁷⁴ He was indicted on one count of felonious assault, one count of attempted felonious assault, and one count of assault on a peace officer. He was sentenced to six years imprisonment because the court found that his spit and saliva constituted a deadly weapon.⁵⁷⁵

On appeal, the appellant argued that his spit and saliva should not be considered a deadly weapon. A “deadly weapon” is defined as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.”⁵⁷⁶ During the trial the defendant’s treating physicians testified that though there is only a remote risk of transmitting HIV via saliva, because the defendant is a hemophiliac, his saliva would have blood in it a majority of the time and as such there would be a potentially high concentration of the HIV virus. The Ohio Court of Appeals determined, based on this testimony, that because the appellant was HIV-positive and a hemophiliac, his saliva was a deadly weapon. The court reasoned that the appellant was correctly convicted under the felonious assault statute because he knew about his illness, knew that “his saliva was a deadly weapon,” and still assaulted the officer.⁵⁷⁷

In a similar case, *State v. Branch*, the HIV-positive defendant spit in the eye of a police officer and was arrested for felonious assault and attempt.⁵⁷⁸ He was sentenced to four years imprisonment. At trial there was evidence to suggest that the spit may have contained blood. The medical examiner testified that there was a small risk of getting HIV from spitting when the saliva contains blood but that saliva alone is not “a significant risk factor in transmitting HIV.”⁵⁷⁹ On appeal, the defendant argued that he could not be convicted under the statute because the risk of spitting in the officer’s eye was negligible.

⁵⁷² *State v. Bird*, 692 N.E.2d 1013 (Ohio 1998)(the HIV-positive defendant pleaded no contest to felonious assault charges for spitting in the eye of a police officer and was sentenced to three to fifteen years imprisonment).

⁵⁷³ OHIO REV. CODE ANN. § 2903.1(a)(2)(West 2010).

⁵⁷⁴ 834 N.E. 2d 847 (Ohio Ct. App. 2005).

⁵⁷⁵ *Id.*

⁵⁷⁶ OHIO REV. CODE ANN. § 2923.11(a)(West 2010)

⁵⁷⁷ *Price*, 834 N.E.2d at 849.

⁵⁷⁸ 2006 WL 2045911 (Ohio Ct. App. 2006)

⁵⁷⁹ *State v. Branch*, 2006 WL 2045911, *1 (Ohio Ct. App. 2006).

In order to convict defendant of attempted felonious assault, the prosecution was required to prove that appellant attempted to knowingly “cause or attempt to cause physical harm to another [...] by means of a deadly weapon or dangerous ordnance” and that the defendant engaged in “conduct that, if successful, would constitute or result in the offense.”⁵⁸⁰ The court determined that even if it was factually or legally impossible under the circumstances for the appellant transmit HIV to the officer, it is no defense if the act could have been completed had the circumstances been as the appellant believed. The court upheld the conviction, finding that the appellant intended to harm the officer and because his saliva was mixed with blood it could be considered a deadly weapon.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

⁵⁸⁰ OHIO. REV. CODE. ANN. §§ 2923.11(a), 2923.02(A)(West 2010)

Oklahoma Statute(s)⁵⁸¹ that Allow for Criminal Prosecution based on HIV Status:

OKLA. STAT. TIT. 21, § 1192.1

Knowingly engaging in conduct likely to transfer HIV virus

It shall be unlawful for any person knowing that he or she has Acquired Immune Deficiency Syndrome (AIDS) or is a carrier of the human immunodeficiency virus (HIV) and with intent to infect another, to engage in conduct reasonably likely to result in the transfer of the person's own blood, bodily fluids containing visible blood, semen, or vaginal secretions into the bloodstream of another, or through the skin or other membranes of another person, except during in utero transmission of blood or bodily fluids, and:

1. The other person did not consent to the transfer of blood, bodily fluids containing blood, semen, or vaginal secretions; or
2. The other person consented to the transfer but at the time of giving consent had not been informed by the person that the person transferring such blood or fluids had AIDS or was a carrier of HIV.

Any person convicted of violating the provisions of this section shall be guilty of a felony, punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years.

OKLA. STAT. TIT. 21, § 1031

Knowingly engaging in prostitution while infected with HIV

Any person who engages in an act of prostitution with knowledge that they are infected with the human immunodeficiency virus shall be guilty of a felony punishable by imprisonment in the custody of the Department of Corrections for not more than five (5) years.

⁵⁸¹ Oklahoma also has a felony communicable disease statute that penalizes exposure to venereal diseases. However, this statute was enacted long before HIV and there has never been a prosecution against an HIV-positive person under the statute. "It is a felony for any person, after becoming infected with a venereal disease and before being pronounced cured by a physician in writing, to marry any other person or to expose any other person by the act of copulation or sexual intercourse to such venereal disease or to liability to contract the venereal disease." OKLA. STAT. TIT. 63, § 1-519(1967). "Venereal disease" means any disease which may be transmitted from any person to any other through or by means of sexual intercourse and found and declared by medical science or accredited schools of medicine to be infectious or contagious. OKLA. STAT. TIT. 63, § 1-517(1963).

HIV-positive persons can face felony charges for failing to disclose their HIV-status to their sexual partners.

It is punishable by up to five years in prison for HIV-positive persons to engage in conduct that carries a “reasonable likelihood” of transmitting HIV, with the intent to infect another. For prosecution the complainant must not have agreed to engage in such conduct or must not have known of the HIV-positive person’s status. HIV transmission is not required for conviction.

Although Oklahoma’s HIV exposure statute requires intent to transmit HIV, prosecutions under this statute have resulted in convictions even if there was no indication that the defendant acted with intent to transmit HIV but only failed to inform her/his sexual partner about her/his HIV status:

- In 2009, a 40-year-old HIV-positive man was arrested and charged with HIV exposure for failing to tell a man that he had HIV before engaging in oral sex.⁵⁸²
- A 20-year-old woman was charged under Oklahoma’s exposure statute solely because she allegedly failed to inform her partner that she was HIV-positive.⁵⁸³
- A 41-year-old HIV-positive man was charged with engaging in conduct likely to transfer HIV for failing to disclose his HIV status to his sexual partner.⁵⁸⁴

The common element in all of these cases was the defendant’s apparent failure to disclose her/his HIV status to sex partners.

Disclosure is an affirmative defense to prosecution under this statute but it is important to note that even when a person does disclose her/his HIV status it can be difficult to prove such disclosure in court. In these matters, relying on party testimony has inherent. For example, an HIV-positive man was charged with knowingly spreading HIV to his girlfriend, who asserted that she did not know the man’s status over the period of their relationship.⁵⁸⁵ It wasn’t until six months after the initial charges were brought that detectives determined, due to the testimony of witnesses, that the woman had in fact been aware of the man’s HIV status before starting their sexual relationship.

The statute does not carve out a specific defense based on the use of a condom or other protection during penile-vaginal, anal, or oral sex, nor has the use of a condom or low viral load been relied upon as a defense in any currently-available reported case decisions in Oklahoma.

HIV-positive persons have been prosecuted under Oklahoma’s criminal HIV exposure law for spitting and biting.

Oklahoma’s HIV exposure statute creates criminal liability for “conduct reasonably likely to result in the transfer of the person’s own blood, bodily fluids containing visible blood, semen, or vaginal

⁵⁸² *Oklahoma City man arrested on suspicion of transmitting AIDS*, NEWSOK, August 27 2009, available at http://newsok.com/man-arrested-on-suspicion-of-transmitting-aids/article/3396100?custom_click=rss

⁵⁸³ *Enid woman will be arraigned next week on felony charge that she exposed a former love to HIV*, AP ALERT, June 8, 2004.

⁵⁸⁴ *Man Faces HIV Charge*, OKLAHOMAN, March 26, 2003, at 2.

⁵⁸⁵ *Authorities Drop Charges Against HIV-Positive Man*, TULSA WORLD, Oct. 1, 1992, at C12.

secretions into the bloodstream of another, or through the skin or other membranes of another person.”⁵⁸⁶ HIV-positive individuals have been charged with HIV exposure for acts, such as biting and spitting, that have only theoretical or remote risks of transmission of HIV and that contravene the actual requirements of the statutes:

- In May 2010, a man claiming to be HIV-positive was booked on four felony complaints of spreading an infectious disease and knowingly engaging to transfer HIV after slinging his head to throw blood at emergency medical workers. He is also alleged to have spit at the workers during his rescue.⁵⁸⁷
- A 50-year old, HIV-positive woman was arrested in October 2008 and charged with engaging in conduct likely to transfer HIV after biting a security guard.⁵⁸⁸

In both of the above cases, the risk of HIV transmission is remote at best. The CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”⁵⁸⁹ The CDC has also concluded that spitting alone has never been shown to transmit HIV.⁵⁹⁰ The application of Missouri’s statute ignores these scientific findings, leading to prosecutions for behavior that has at best a remote possibility of transmitting HIV.

Engaging in sex work while HIV-positive can lead to enhanced penalties of up to five years in jail.

Upon conviction for prostitution, sex workers face up to five years in prison if they know they are HIV-positive. This specifically targets HIV-positive persons regardless of whether they intended to transmit HIV, transmitted the virus, or engaged in activities likely or possible to do so. On the face of this statute, no actual sexual activity is required to face felony prosecution.

HIV-positive persons have also been convicted under general criminal laws.

Though Oklahoma enacted its HIV exposure statute in 1997, there has been at least one case of HIV exposure since that time that has been prosecuted under general criminal laws. In 2000, a 41-year-old, HIV-positive man pleaded guilty to fifty-six counts of sexual abuse and one count of attempted murder after he engaged in sexual intercourse with two female minors.⁵⁹¹ Each count represented a month that he engaged in sexual conduct with one or both of the minors. The

⁵⁸⁶ OKLA. STAT. TIT. 21, § 1192.1 (West 2010).

⁵⁸⁷ Shannon Muchmore, *Man Who Says He Has HIV Allegedly Spits on Emergency Workers*, TULSA WORLD, May 23, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20100523_298_0_Amanwh547994.

⁵⁸⁸ Jay Marks, *HIV-positive Woman Faces Felony for Bite*, NEWSOK, Oct. 8, 2008, <http://newsok.com/hiv-positive-woman-faces-felony-for-bite/article/3308838>.

⁵⁸⁹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can HIV be transmitted through a Human Bite?*, (March 25, 2010), <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

⁵⁹⁰ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

⁵⁹¹ Bill Braun, *Tulsa Man Imprisoned for Life on Sex Counts*, TULSA WORLD, May 24, 2000, at A13

attempted murder charge arose from allegations that he knew he was HIV-positive and repeatedly engaged in unprotected sex with one of the minors, who later became pregnant and both she and her baby tested positive for HIV. The other minor tested negative for HIV. The defendant was sentenced to four consecutive life sentences and fifty-three concurrent life sentences.

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Oregon Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Persons with HIV have been prosecuted for HIV exposure under the general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in Oregon, however, Oregon has prosecuted HIV-positive persons for exposing others to HIV under general criminal laws, including attempted murder, assault, and reckless endangerment. Failing to disclose HIV status to sexual partners may result in prosecution and conviction.

In *State v. Hinkhouse*, an HIV-positive defendant was convicted of ten counts of attempted murder and ten counts of attempted assault when he failed to disclose his HIV status to numerous sexual partners, including a 3-year old girl that he sexually abused.⁵⁹² The defendant had refused to use a condom with several sexual partners and denied being HIV-positive, despite being warned by his parole officer not to have unprotected sex.⁵⁹³ According to the testimony of one sexual partner, the defendant said that if he ever became HIV-positive, he would spread the virus to others.⁵⁹⁴ At least one of the defendant's partners was infected with HIV though this fact was irrelevant to prosecution.⁵⁹⁵ He was sentenced to seventy years in prison.⁵⁹⁶

On appeal, the defendant argued that he did not intend to kill his sexual partners, only to gratify himself sexually.⁵⁹⁷ The Court of Appeals of Oregon disagreed, finding that the defendant's refusal to wear condoms, failure to disclose his HIV status, and awareness of the risks of unprotected sex were all sufficient to prove intent to cause harm or death.⁵⁹⁸ The court also found that Hinkhouse's unsafe sexual practice was not only for his own sexual gratification because he did use condoms with the one woman that he planned to marry. Before his attempted murder conviction, the defendant also served eleven months in prison for recklessly endangering two women by engaging in unprotected sex and sexually abusing a 15-year old girl.⁵⁹⁹

In 1993, another HIV-positive man in Oregon was convicted of assault and reckless endangerment when two of his sexual partners tested positive for HIV.⁶⁰⁰ He was sentenced to three years in prison, registered as a sex offender, and was forbidden from going into bars, contacting victims, contacting girls without written permission, and having unprotected sex with an HIV-negative person. He later received seven years in prison for exposing a Canadian woman to HIV in 1996. It is not known whether the man used condoms during sex or disclosed his status.

⁵⁹² *State v. Hinkhouse*, 912 P.2d 921 (Or. Ct. App. 1996), *adhered to as modified*, 915 P.2d 489 (Or. Ct. App. 1996); Rick Bella, *Jury Finds Hinkhouse Used HIV as Weapon*, OREGONIAN, Mar. 16, 1994, at B01.

⁵⁹³ *Hinkhouse*, 912 P.2d at 923.

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.* at 922.

⁵⁹⁶ Josh Meyer, *Non-Unanimous Jury Idea Appeals to Some Reformers*, L.A. TIMES, Sept. 28, 1994, at 12.

⁵⁹⁷ *Hinkhouse*, 912 P.2d at 922.

⁵⁹⁸ *Id.* at 925.

⁵⁹⁹ *New Charges Face Man Infected with AIDS Virus*, OREGONIAN, Nov. 2, 1993, at B03.

⁶⁰⁰ Ann Saker, *More Jail for Fugitive Sex Offender*, OREGONIAN, Dec. 8, 2005, at B01.

Individuals living with HIV in Oregon should be aware that they risk criminal liability if they fail to disclose their HIV status to sexual partners or engage in unprotected sex. The two cases above concern the rare and extreme instances when HIV-positive individuals repeatedly failed to disclose their HIV status, refused to use condoms or other protection. In *Hinkhouse*, the defendant's long history of failing to tell his partners about his HIV status and refusal to wear condoms certainly went to the court's determination of specific intent but the facts of the case could have been more appropriately applied to a charge of reckless endangerment.

HIV-positive status may also be a factor in sentencing. In *State v. Guayante*, an HIV-positive defendant was convicted on several counts of sexual abuse of a 13-year old girl.⁶⁰¹ On appeal, he argued that it would be disproportionately harsh to use his HIV-positive status as an "aggravating factor" during sentencing. The Court of Appeals of Oregon disagreed stating the defendant's willingness to expose his victim to HIV infection was a valid aggravating factor to consider when imposing maximum, consecutive sentences for sexual assault. Given that the defendant in *Guayante* exposed a girl to the *risk* of HIV infection, neither the intent to transmit HIV nor actual HIV transmission is required for aggravated factor sentencing.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

⁶⁰¹ State v. Guayante, 783 P.2d 1030, 1031 (Or. Ct. App. 1989).

Pennsylvania Statute(s) that Allow for Criminal Prosecution based on HIV Status:

18 PA. CONS. STAT. ANN. § 2703

Assault by prisoner

A person confined in any jail, prison, or correctional or penal institution is guilty of a felony of the second degree if he/she, while confined (or while being transported to or from such a facility), intentionally or knowingly causes another to come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material when, at the time of the offense, the person knew, had reason to know, or should have known or believed that such fluid or material was infected by a communicable disease, including, but not limited to, HIV or hepatitis B.

The court shall order that any sentence imposed for a violation of this section and subsection §2702(a) (related to aggravated assault), where the victim is a detention facility or correctional facility employee, be served consecutively with the person's current sentence.

Violation of this statute shall be a second degree felony.

18 PA. CONS. STAT. ANN. §2704

Assault by life prisoner

Every person sentenced to death or life imprisonment who intentionally or knowingly causes another to come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material when, at the time of the offense, the person knew, had reason to know, or should have known or believed that the fluid or material was infected with HIV, is guilty of a crime, the penalty for which shall be the same penalty for murder of the second degree.

18 PA. CONS. STAT. ANN. § 5902

Prostitution while HIV-positive

It is a felony of the third degree for a person to commit prostitution knowing he or she is HIV-positive; to knowingly promote prostitution of one who is HIV-positive; or, if the person knows him or herself to be HIV-positive, to patronize a prostitute.

18 PA. CONS. STAT. ANN. §§ 1103, 1101

Sentence of imprisonment for Felonies

Second degree felony: a term which shall be fixed by the court at not more than ten years.

Third degree felony: a term which shall be fixed by the court at not more than seven years.

Fines for Felonies

First or second degree felony: \$25,000.

Third degree felony: \$15,000.

HIV-positive persons have been convicted under Pennsylvania’s general criminal laws for various types of conduct, including failing to disclose their HIV status to their sexual partners.

Although Pennsylvania does not have a specific criminal HIV-exposure law to address non-incarcerated persons and those who are not sex workers, numerous persons have been prosecuted for HIV exposure under general criminal laws, including murder, attempted murder, and reckless endangerment.

In Pennsylvania, HIV-positive persons have been prosecuted for failing to disclose their HIV status to their sexual partners. In the 2006 case, *Commonwealth v. Cordoba*, a man was charged with reckless endangerment for having unprotected, consensual oral sex and failing to disclose to his partner that he was HIV-positive.⁶⁰² The trial court ruled that because consent is not a defense to reckless endangerment, to prosecute an HIV-positive individual for engaging in consensual sex would lead to absurd results, including prosecution even if the person did disclose her/his status.⁶⁰³

⁶⁰² *Commonwealth v. Cordoba*, 2004 WL 3322620, at *1 (Pa. Com. Pl. 2004), *overruled by* *Commonwealth v. Cordoba*, 902 A.2d 1280 (Pa. Super. 2006).

⁶⁰³ The court found that “[U]nder the Commonwealth’s theory, even if an HIV-positive individual informs his or her partner of this status prior to engaging in unprotected sexual activity, the statute would still be violated. A person carrying an infectious disease would commit a crime every time he/she had consensual sex. This is an absurd result, as individuals in this Commonwealth are free to make such intimate decisions outside the glare of state scrutiny. Lastly, allowing an HIV-positive individual to be prosecuted under this statute for allegedly having consensual sexual contact with another adult would open the floodgates to jilted lovers and angry spouses to file charges after a relationship has soured.”⁶⁰³ *Id.* On appeal, the Superior Court did not address this issue because it was outside of the scope of the case and was not at issue because the defendant never disclosed his status. *Commonwealth v. Cordoba*, 902 A.2d 1280, 1286 (Pa. Super. 2006).

On appeal the Superior Court of Pennsylvania reversed the trial court's findings. Though there was never any transfer of blood or semen that could result in HIV transmission (the defendant only ejaculated on the face and chest of the complainant, however, HIV has been found in pre-seminal fluids),⁶⁰⁴ the court found that the sex was not consensual and amounted to reckless endangerment because the defendant failed to disclose his HIV status to the complainant.⁶⁰⁵ Reckless endangerment under Pennsylvania law is defined as "conduct which places or may place another person in danger of death or serious bodily injury."⁶⁰⁶ Even though most exposure to the blood or semen of an HIV-positive person will not result in transmission, the court determined that the prosecution need only establish that the defendant's conduct placed "*or may have placed*" another in danger of serious bodily injury or death.⁶⁰⁷

To establish a *prima facie* case for reckless endangerment, the court found that there only needs to be a possibility of the risk of harm, regardless of the likelihood of that harm actually occurring. According to the court, the defendant's actions constituted a "gross deviation from the standard of conduct that a reasonable person would observe" by engaging in oral sex without informing the complainant of his HIV status.⁶⁰⁸

The statute does not explicitly provide for a defense based on use of condoms, or other protection, or a low viral load (amount of active HIV virus in an individual's bloodstream) even though both significantly reduce the risk of HIV transmission to near zero.

Though disclosing one's HIV status is a defense to this type of prosecution, disclosure of HIV status is difficult to prove in court without witnesses or documentation, and juries often consider the testimony of HIV-positive defendants less credible than the testimony of HIV-negative persons claiming that they were exposed to HIV without consent.

In addition to reckless endangerment, HIV-positive individuals have also been charged with murder and attempted murder for failing to disclose their HIV-positive status to their sexual partners:

- In 1999, a 30-year-old man is charged with murder, attempted homicide and aggravated assault for failing to tell five female sex partners that he had HIV.⁶⁰⁹ Each of the women allegedly tested positive for HIV after engaging in sexual conduct with the man.⁶¹⁰ The man died in 2000 before the case could go to trial.⁶¹¹
- In 1996, an HIV-positive man received twenty years to life in prison for sexually assaulting a

⁶⁰⁴ *Cordoba*, 902 A.2d at 1283 (Pa. Super. 2006)

⁶⁰⁵ *Id.* at 1286.

⁶⁰⁶ *Cordoba*, 18 PA. CONN. STAT. ANN. § 2705 (West 2010).

⁶⁰⁷ 902 A.2d at 1289.(emphasis not added).

⁶⁰⁸ *Id.*(quoting 18 PENN. CON. STAT. ANN. § 302(b)(3)).

⁶⁰⁹ Jeff Gelman, *AIDS-Related Death Leads to 3rd-Degree Murder Charge*, MORNING CALL (Allentown, PA), Nov. 20, 1999, at A03.

⁶¹⁰ *Id.*

⁶¹¹ Debbie Garlicki, *Man Who Allegedly Infected with AIDS Virus Dies*, MORNING CALL (Allentown, PA), Dec. 1, 2000 available at http://articles.mcall.com/2000-12-01/news/3330315_1_aids-virus-infected-murder-charge.

12-year old girl, after which she tested positive for HIV.⁶¹²

- In 1992, a 50-year old man with AIDS was arrested after he allegedly paid several hundred Philadelphia boys for their sexual favors, underwear, and feces.⁶¹³ The man's bail was increased to \$20 million after it was disclosed that he was HIV-positive.⁶¹⁴ He died before the trial.⁶¹⁵
- In *Commonwealth v. Bey*⁶¹⁶, the court affirmed the ten to twenty year sentence of the single count of a deviate sexual intercourse due in part to the defendant's HIV-positive status. The court reversed the trial court's determination that the defendant was a sexual predator.

In *Commonwealth v. Walker*, an HIV-positive man was found guilty of communicating terrorist threats when he scratched a parole officer on the hand and said, "I have open cuts on my hands. Life is short. I am taking you with me."⁶¹⁷ The officer knew Walker was HIV-positive. On appeal, Walker argued that the evidence against him was insufficient and that he didn't have the requisite intent to terrorize the officer. To be convicted of making terroristic threats one must communicate a threat to terrorize another or act with reckless disregard of the risk of causing terror. The court affirmed the conviction finding that the jury could have inferred that Walker's statements intended to cause terror from fear of HIV infection. The court held that the likelihood of HIV infection from scratching was immaterial to the case as long as the threats were made with the intent to cause such fear.

Other prosecutions of HIV-positive persons under Pennsylvania's general criminal laws have included convictions for acts that are not known to transmit HIV:

- A 39-year old, HIV-positive man was charged with aggravated assault and was sentenced to thirteen years and six month to twenty-seven years in prison in 1999 for biting a security guard who was arresting him for shoplifting. The guarded tested negative for HIV.⁶¹⁸
- In October 2009, a 34-year-old HIV and Hepatitis C-positive woman was charged for aggravated assault after she spat in the face of another inmate. She was later sentenced to

⁶¹² Jeff Gelman, *AIDS-Related Death Leads to 3rd-Degree Murder Charge*, MORNING CALL (Allentown), Nov. 20, 1999, at A03.

⁶¹³ Michael DeCoury Hinds, *Man Who Has Aids May Have Infected Hundreds of Boys*, MORNING CALL (Allentown, PA), Mar. 28, 1992, at A02.

⁶¹⁴ U.S. ex Rel. Savitz v. Gallagher, 800 F.Supp. 288 (E.D. Pa. 1992); Barnaby C. Wittels & Stephen Robert LaCheen, *The Persecution of Ed Savitz*, PHILA. INQUIRER, May 12, 1993, at A11; see also Lynne M. Abraham, *Ed Savitz was No Victim, No Icon of Virtue*, PHILA. INQUIRER, June 1, 1993, at A13; *What Has Savitz Case Taught Us?*, PHILA. DAILY NEWS, Mar. 30, 1993.

⁶¹⁵ Lee Linder, *Sex Charges Dropped Against Savitz but Alleged Victims Sue Dead Man's Estate*, MORNING CALL (Allentown, PA), Apr. 6, 1993, at A05.

⁶¹⁶ 841 A.2d 562 (Pa. Super Ct. 2004)

⁶¹⁷ 836 A.2d 999 (Pa. Super. Ct. 2003).

⁶¹⁸ Debbie Garlicki, *City Man with HIV Virus Gets Prison Time for Biting*, MORNING CALL (Allentown, PA), Feb. 4, 1999, available at http://articles.mcall.com/1999-02-04/news/3240187_1_infected-human-immunodeficiency-virus-police-officer; Laura Whitehorn, *America's Most Unwanted*, POZ, Aug. 2000, http://www.poz.com/articles/204_10206.shtml.

twenty-one months to ten years imprisonment.⁶¹⁹

- In 1997, a 32-year old HIV-positive woman was arrested and charged with attempted murder after she allegedly stabbed a CVS employee with a syringe, claiming the syringe was infected with HIV.⁶²⁰
- In *Commonwealth v. Brown*⁶²¹, a defendant, who was HIV-positive and had Hepatitis B, was convicted of aggravated assault for throwing fecal matter on a guard's face.

Many of these convictions are based on the stigma and fear surrounding HIV and not on the science of how HIV is transmitted.

HIV-positive persons who are incarcerated face increased penalties for exposing others to their bodily fluids, including saliva.

The Pennsylvania HIV exposure statute for incarcerated persons is overly broad and criminalizes conduct that does not in fact transmit HIV. Under the statute, if a person in confinement intentionally causes another person to “come into contact with blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material” and “the person knew, had reason to know, or should have known or believed that such fluid or material was infected by a communicable disease, including, but not limited to, HIV”⁶²² that person can face an additional sentence of up to ten years in prison.⁶²³ The CDC has long maintained that there is no risk of transmission from saliva, urine, or feces unless there is contamination with infected blood.

If the incarcerated person is already serving a life sentence or is on death row and violates the statute then that person will be prosecuted for second-degree murder.

It is a felony for people who are HIV-positive to engage in or solicit prostitution.

A person is guilty of prostitution while HIV-positive if she/he is part of a house of prostitution, engages in sexual activity as a business, or loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.⁶²⁴

⁶¹⁹ Michael Rudolf, *HIV-Positive Prisoner Sentenced for Spitting at Inmate*, CITIZENVOICE.COM, Oct. 15, 2009, <http://citizensvoice.com/news/hiv-positive-prisoner-sentenced-for-spitting-at-inmate-1.335692>; Josh Mrozinski, *Inmate Charged for Assault for Spitting*, WCEXAMINER.COM (Wyoming County, Pa.), Jan. 14, 2009, <http://wcexaminer.com/sections/news/archive/2009/01/14/inmate-charged-with-assault-for-spitting.aspx>.

⁶²⁰ Thomas J. Gibbons Jr., *Syringe-Attack Case in Suspect's Second*, PHILA. INQUIRER, Jan. 17, 1997, at B03.

⁶²¹ 605 A.2d 429 (Pa. Super. Ct. 1992).

⁶²² The statute was rewritten in 1998 to include “HIV” after the 1992 conviction of inmate, who tested positive and been counseled for both HIV and Hepatitis B, for throwing urine and feces at a prison guard. *See Commonwealth v. Brown*, 605 A.2d 429 (Pa. Super. Ct. 1992). The defendant was convicted of aggravated assault, assault by prisoner, simple assault, and reckless endangerment and sentenced to ten to twenty years in prison to run consecutively with the sentence he was already serving. The court found that because the defendant knew he had both HIV and Hepatitis B and threw the fecal matter at a guard, that was sufficient to produce “serious bodily injury” and sustain a conviction for Assault by Prisoner. *Id.* at 431.

⁶²³ 18 PA. CONS. STAT. §§ 5902(a), 1103 (West 2010).

⁶²⁴ § 5902(A).

Sexual activity for the purposes of the statute is broadly defined as “sexual intercourse for hire” and “includes homosexual and other deviate sexual relations.”⁶²⁵ The lack of a clear definition of “sexual acts” in the statute has led the Pennsylvania courts to attempt to define what types of sexual acts are punishable under the prostitution statute.⁶²⁶ Many of the acts that the courts have found to be criminally liable “sexual acts” pose no risk of transmitting HIV, including acts that do not involve penetration of the body⁶²⁷ or the transfer of blood or semen, such as massaging another person’s genitals⁶²⁸ and giving a hand job or fingering.⁶²⁹ This broad definition of “sexual acts” poses the risk of severe penalties for HIV-positive sex workers who engage in conduct that does not transmit HIV.

Disclosure of one’s HIV status, the use of condoms or other protection, or the sex worker’s viral load are not considered a defense to prosecution. This creates a situation where HIV-positive person are prosecuted and suffer increased penalties due to their HIV-status alone and not to the risk they pose of transmitting HIV.

The punishment for HIV-positive sex workers is significantly harsher than the punishment for sex workers who do not test positive for HIV. Prostitution is normally punished under varying degrees of misdemeanors that range from a few months to a few years imprisonment, based on the number of prior convictions.⁶³⁰ However, if a sex worker is HIV-positive she/he is subject to third-degree felony charges, punishable by up to seven years in prison.⁶³¹

Examples of prosecutions under this statute include:

- In January 2009, a 26-year old sex worker pleaded guilty to reckless endangerment and engaging in prostitution while HIV-positive. She received three years probation.⁶³²
- In 1996, an HIV-positive sex worker was charged with engaging in prostitution while being HIV-positive.⁶³³ Another HIV-positive sex worker was convicted of the same offense in 1998, and sentenced to seven years imprisonment.⁶³⁴

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⁶²⁵ § 5902(A), (F).

⁶²⁶ See *Commonwealth v. Bleigh*, 586 A.2d 450 (Pa. Super. Ct. 1991).

⁶²⁷ *Commonwealth v. Lundberg*, 37 Pa. D. & C.3d 4 (Pa. Ct. Com. Pl. 1985).

⁶²⁸ *Commonwealth v. Cohen*, 538 A.2d 582, 583 (Pa. Super. Ct. 1988).

⁶²⁹ *Id.*

⁶³⁰ 18 PA. CONS. STAT. ANN. § 5902(A.1)(WEST 2010). Prostitution charges that are non-HIV specific are normally prosecuted as either first, second, or third degree misdemeanors that range in maximum sentences from one to five years imprisonment. 18 PA. CONS. STAT. ANN. § 1104 (WEST 2010)

⁶³¹ § 5902 (A.2).

⁶³² Laurie Mason, *HIV-positive Prostitute Sentenced*, BUCKS COUNTY COURIER TIMES (Philadelphia, PA), Jan. 16, 2009, at 1.

⁶³³ David Kinney, *Authorities Crack Down on HIV-Positive Prostitutes*, PHILA. INQUIRER, Aug. 17, 1996, at B03.

⁶³⁴ April Adamson, *Obscure Law Used on Reckless Hookers*, PHILA. DAILY NEWS, June 16, 1998, at 8.

Rhode Island Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Rhode Island has a communicable disease control statute but this statute has not targeted HIV exposure.

Rhode Island does have a general sexually transmitted disease (STD) exposure statute. It is an offense punishable by up to \$100 or three months in prison for an individual with an STD to knowingly expose another to infection.⁶³⁵ However, this law was enacted long before HIV was discovered and thus not originally intended to address HIV. There has never been an arrest or prosecution for HIV exposure under this or any other statute in Rhode Island.

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⁶³⁵ R.I. GEN. LAWS § 23-11-1 (1921) (imposing penalties for knowing exposure to sexually transmitted diseases including, but not be limited to, syphilis, gonorrhea, chancroid, granuloma inguinale and lymphogranuloma venereum).

South Carolina Statute(s) that Allow for Criminal Prosecution based on HIV Status:

S.C. Code Ann. § 44-29-145

Penalty for exposing others to HIV

It is unlawful for a person who knows he or she is infected with HIV to: (1) knowingly engage in sexual intercourse (vaginal, anal, or oral) with another person without first informing that person of his HIV infection; (2) knowingly commit an act of prostitution with another person; (3) knowingly sell or donate blood, blood products, semen, tissue, organs, or other body fluids; (4) forcibly engage in sexual intercourse (vaginal, anal, or oral) without the consent of the other person, including one's legal spouse; or (5) knowingly share with another person a hypodermic needle/syringe without first informing that person that the needle or syringe has been used by someone infected with HIV.

Any person convicted under this statute is guilty of a felony, resulting in imprisonment up to ten years and/or a maximum fine of \$5,000.

S.C. Code Ann. §§ 44-29-60, 44-29-140

Penalties Pertaining to Venereal Disease

It is unlawful for anyone infected with an STD included in the annual SC Department of Health and Environmental Control List of Reportable Diseases to knowingly expose another to infection. ("HIV" was included in the DHEC list for 2009.)

Any person in violation of this statute has committed a misdemeanor. Persons will be subject to a fine of not more than \$200 and imprisoned for not more than thirty days.

HIV-positive persons face criminal penalties for engaging in sexual activity without disclosing their HIV status.⁶³⁶

It is felony, punishable by a fine of no more than \$5,000 and/or imprisonment for up to ten years, for a person who is aware that she/he is HIV-positive to knowingly engage in penile-vaginal, anal, or

⁶³⁶ Though there is a separate misdemeanor penalty for exposing people to venereal diseases, including HIV, S.C. CODE ANN. §§ 44-29-60, 44-29-140, this statute is not in practical effect for HIV exposure prosecutions as there is an HIV-specific statute for HIV exposure, S.C. CODE ANN. § 44-29-145. There does not appear to be any HIV cases prosecuted under the venereal disease statute.

oral sex with another person without first informing that person of her/his HIV status. Neither actual transmission nor the intent to transmit HIV is necessary for prosecution.

On its face, the statute does not recognize the use of protection, such as condoms, or low viral load as defenses to prosecution. Under the terms of the statute, even if HIV-positive persons protect their sexual partners by using a condom, they must also disclose their status to avoid application of the statute.

In South Carolina there have been numerous prosecutions of HIV-positive individuals for engaging in consensual sex but who allegedly failed to disclose their HIV status:

- An HIV-positive man who failed to disclose his HIV status and engaged in unprotected, consensual sex with a female partner was charged with exposing another to HIV.⁶³⁷
- An HIV-positive man was sentenced to six years in prison and four years of probation for knowingly exposing his wife to HIV.⁶³⁸ She did not test positive for HIV and maintained that she had no knowledge that her husband was HIV-positive.
- A 40-year-old HIV-positive man pleaded guilty to knowingly exposing his ex-girlfriend to HIV and was sentenced to four and a half years imprisonment.⁶³⁹ Investigators claim that the man never told the woman he was HIV-positive nor did he insist on using condoms. The woman learned she was HIV-positive during a pre-natal checkup for the twins that the man fathered. But the woman's HIV status was irrelevant to the charges.
- A 35-year-old HIV-positive man was charged with exposing another to HIV after he failed to disclose his HIV status to his sexual partner with whom he engaged in consensual, unprotected sex.⁶⁴⁰

Though disclosure is an affirmative defense to prosecution in South Carolina, whether or not disclosure actually occurred is often open to interpretation and always depends on the word of one person against another.

General criminal laws have been used to prosecute HIV-positive persons for alleged HIV exposure.

In a recent South Carolina case, a 41-year-old HIV-positive man was charged with assault and intent

⁶³⁷ *Athens police say man may have deliberately spread HIV*, AUGUSTA CHRONICLE, Apr. 17, 2010, available at <http://chronicle.augusta.com/news/crime-courts/2010-04-17/athens-police-say-man-may-have-deliberately-spread-hiv>

⁶³⁸ Stephanie Toone, *Former Aiken County teacher found guilty of exposing others to HIV*, AUGUSTA CHRONICLE, Nov. 13, 2009, available at http://chronicle.augusta.com/stories/latest/lat_703284.shtml

⁶³⁹ *Man Knowingly Exposed Woman to HIV*, WYFF4.COM, Feb. 2, 2009, available at <http://www.wyff4.com/r/18623886/detail.html>

⁶⁴⁰ *Deputies: Man illegally exposes victim to HIV virus*, WMBFNEWS.COM, Sept. 11, 2009, available at <http://www.wmbfnews.com/Global/story.asp?S=11115609>

to kill after biting his neighbor.⁶⁴¹ The original charge of simple assault was upgraded to intent to kill after it was discovered that the defendant was HIV-positive.⁶⁴² The CDC has long maintained that spitting alone has never been shown to transmit HIV.⁶⁴³

HIV-positive persons can be fined and imprisoned if convicted of prostitution.

In South Carolina a person who is aware that she/he is HIV-positive may be criminally liable for committing an act of prostitution, facing penalties of up to ten years in prison and/or be subject to a \$5,000 fine. In contrast, prosecutions for HIV-negative sex workers have penalties limited to ninety days to one year in prison and a fine of a few hundred dollars.⁶⁴⁴ By the mere fact of being HIV-positive, sex workers are subject to more than ten times greater penalties than their HIV-negative counterparts. In addition to disproportionate penalties for HIV-positive sex workers, South Carolina's HIV exposure statute potentially targets activities that pose no risk of HIV transmission.

Prostitution is defined as “engaging or *offering* to engage in sexual activity with or for another in exchange for anything of value.”⁶⁴⁵ Under this definition, the mere offer of a sexual act could result in imprisonment under the HIV exposure statute even when there is no risk of HIV transmission. And even if the offered act was completed there is no consideration about whether the activities posed a risk of HIV exposure or transmission (i.e.: an HIV-positive sex worker performing oral sex has a remote possibility of HIV exposure/transmission because saliva is not a means to transmit HIV).

The term “sexual activity” for a prostitution charge, and subsequent HIV exposure prosecution, has a broad definition and includes many acts that pose no risk of transmitting HIV. Under the original HIV exposure statute, S.C. CODE ANN. § 44-29-145, prosecutions were limited to penile-vaginal sex, anal sex, and oral sex. However, for prostitution prosecutions “sexual activity” includes, but is not limited to, acts of masturbation; touching a person’s clothed, or unclothed, genitals or breasts; and other acts such as using sex toys.⁶⁴⁶ These activities pose absolutely no risk of HIV transmission but HIV-positive sex workers may face felony charges for engaging in them. It is not a defense if condoms or other protection were used during sexual activity or if HIV status was disclosed.

HIV-positive persons are can face criminal penalties for donating blood, organs, human tissue, semen, or other body fluids.

It is felony, punishable by a fine of no more than \$5,000 and/or imprisonment for up to ten years, for a person who is aware that she/he is HIV-positive to knowingly donate or sell blood, semen, tissue, organs or other bodily fluids. Neither the intent to transmit HIV nor actual transmission is required for liability.

⁶⁴¹ Greg Suskin, *Charges Upgraded Against HIV Positive Man After Fight*, WSOCTV.COM, July 23, 2009, <http://www.wsoc.tv.com/news/20147162/detail.html>

⁶⁴² *Id.*

⁶⁴³ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

⁶⁴⁴ S.C. CODE ANN. § 16-15-110 (2010).

⁶⁴⁵ § 16-15-375(4).

⁶⁴⁶ § 16-15-375(5).

HIV-positive persons can be prosecuted and jailed for sharing dirty syringes with others.

It is felony, punishable by up to ten years imprisonment and/or a maximum fine of \$5,000 for a person who is aware that she/he is HIV-positive and knowingly share equipment used for injecting drugs with another without disclosing her/his HIV status.

HIV-positive persons in South Carolina should not share, or exchange, or otherwise transfer to any other person unsterilized needles used to inject substances into the human body. Simply giving someone a dirty syringe is sufficient for a conviction; neither the intent to transmit HIV nor actual transmission is required.

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South Dakota Statute(s) that Allow for Criminal Prosecution based on HIV Status:

S.D. CODIFIED LAWS § 22-18-31***Class 3 Felony: Intentional exposure to HIV infection***

Any person who, knowing himself or herself to be infected with HIV, intentionally exposes another person to infection through any of the following means is guilty of criminal exposure to HIV (Class 3 felony):

- (1) Engaging in sexual intercourse or other intimate physical contact with another person;
- (2) Transferring, donating, or providing blood, tissue, semen, organs, or other potentially infectious body fluids or parts for transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of HIV transmission; or
- (3) Dispensing, delivering, exchanging, selling, or in any other way transferring to another person any nonsterile intravenous or intramuscular drug paraphernalia that has been contaminated by himself or herself; or
- (4) Throwing, smearing, or otherwise causing blood/semen to come in contact with another for the purpose of exposing that person to HIV infection.

“Intimate physical contact” means bodily contact which exposes a person to the body fluid of the infected person in any manner that presents a significant risk of HIV transmission. S.D. CODIFIED LAWS § 22-18-32(2).

“Intravenous or intramuscular drug paraphernalia” means any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body. S.D. CODIFIED LAWS § 22-18-32(3).

It is an affirmative defense to prosecution if it is proven by a preponderance of the evidence that the person exposed to HIV knew that the infected person was infected with HIV, knew that the action could result in infection with HIV, and gave advance consent to the action with that knowledge. S.D. CODIFIED LAWS § 22-18-33.

The actual transmission of HIV is not required. S.D. CODIFIED LAWS § 22-18-34.

S.D. CODIFIED LAWS § 22-6-1***Felony classes and penalties***

Class 3 felony: maximum fifteen years imprisonment in the state penitentiary. In addition, a fine of \$30,000 may be imposed.

Engaging in sexual intercourse without disclosing HIV status can result in imprisonment

In South Dakota, failing to disclose HIV status to sexual partners may result in imprisonment. It is a Class 3 felony punishable by a maximum of fifteen years in prison⁶⁴⁷ if an individual aware that she/he is HIV-positive intentionally exposes another to infection through sexual intercourse or “other intimate physical contact.”⁶⁴⁸ A \$30,000 fine may also be imposed.⁶⁴⁹ Sex offender registration is mandatory.⁶⁵⁰ “Intent” for the purposes of this statute requires a specific design to expose another to HIV or an intent to engage in the prohibited activities under the statute.⁶⁵¹

Neither the intent to transmit HIV nor actual transmission is required.⁶⁵²

An individual prosecuted under this exposure law has a defense that may prevent conviction if she/he can prove that the person exposed to HIV (1) was aware of her/his HIV status, (2) knew that the sexual contact could result in HIV infection, and (3) consented to HIV exposure with knowledge of these risks.⁶⁵³ However, a sexual partner’s consent to HIV exposure may be difficult to prove as whether or not disclosure occurred is often open to interpretation and always depends on the words of one person against another.

Engaging in unprotected sex while HIV-positive can result in imprisonment. In South Dakota’s first prosecution for HIV exposure, an HIV-positive college student received 120 days in jail and 200 hours of community service⁶⁵⁴ after he had unprotected sex with several classmates without disclosing his HIV status.⁶⁵⁵ Under the terms of his guilty plea, the man was also ordered to abstain from unprotected sex unless he notified partners that he was HIV-positive.⁶⁵⁶ He later received four years in prison for failing to return to jail on schedule.⁶⁵⁷

⁶⁴⁷ S.D. CODIFIED LAWS § 22-6-1(6) (2005).

⁶⁴⁸ § 22-18-31(1) (2005).

⁶⁴⁹ § 22-6-1(6)(2005).

⁶⁵⁰ See S.D. CODIFIED LAWS § 22-24B-1(20) (West 2010) (defining intentional HIV exposure as a sex crime); S.D. CODIFIED LAWS § 22-24B-2 (West 2010) (requiring sex offender registration for any person convicted of a sex crime).

⁶⁵¹ § 22-1-2(1)(b)(West 2010).

⁶⁵² § 22-18-34 (2000).

⁶⁵³ § 22-18-33 (2005).

⁶⁵⁴ Jo Napolitano, *South Dakota: Jail Term for H.I.V. Exposure*, N.Y. TIMES, Aug. 30, 2002, at A-15.

⁶⁵⁵ John W. Fountain, *After Arrest, Campus Queues for H.I.V. Tests*, N.Y. TIMES, May 1, 2002, at A-16, available at <http://www.nytimes.com/2002/05/01/us/after-arrest-campus-queues-for-hiv-tests.html>; see also John-John Williams, *2 S. Dakotans Sentenced for Spreading HIV*, ARGUS LEADER (Sioux Falls, SD), Mar. 26, 2003, at 1B; Leslie E. Wolf, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 863-65 (2004).

⁶⁵⁶ Jo Napolitano, *supra* note 679.

⁶⁵⁷ Leslie E. Wolf, *supra*, at 863-65.

The following cases serve as further examples of prosecutions that may result under South Dakota law:

- In August 2005, a 26-year old, HIV-positive man was arrested and charged with several counts of intentional exposure to HIV after he allegedly lied about his HIV status to multiple sexual partners.⁶⁵⁸
- In November 2006, an HIV-positive woman received a suspended prison sentence after she exposed several sexual partners to HIV.⁶⁵⁹ None of the woman's partners were infected but this is irrelevant to prosecution.
- In May 2002, two HIV-positive partners in a gay couple were indicted for exposing several sexual partners to HIV.⁶⁶⁰ In March 2003, one of the men pleaded guilty, receiving forty-five days in jail and five years probation.⁶⁶¹ The outcome of his partner's case is unknown.
- In March 2003, a 30-year old, HIV-positive woman received three months imprisonment and five years probation for intentionally exposing a sexual partner to HIV. She was also ordered to abstain from unprotected sex and submit to lie detector tests when requested.⁶⁶²

Consecutive, as opposed to concurrent, sentencing is allowed at the discretion of a sentencing court in South Dakota.⁶⁶³ Thus, if an HIV-positive person is found guilty of exposing multiple partners to the virus, it is possible for her/him to receive a sentence of fifteen years *per* offense.

It is a felony to provide blood, tissue, semen, organs, body parts, or body fluids for use by another.

In South Dakota, imprisonment may also result from donating bodily fluids or tissues. It is a Class 3 felony, punishable by up to fifteen years in prison,⁶⁶⁴ if an individual aware that she/he is HIV-positive intentionally exposes another to infection by transferring, donating, or providing blood, tissue, semen, organs, or other “potentially infectious bodily fluids” for use by another.⁶⁶⁵ Specifically, fluids or tissues may not be provided for “transfusion, transplantation, insemination, or other administration to another in any manner that presents a significant risk of HIV transmission.”⁶⁶⁶ A \$30,000 fine may also be imposed.⁶⁶⁷

⁶⁵⁸ Denise Tucker, *Inmate May Have Spread HIV*, ARGUS LEADER (Sioux Falls, SD), Aug. 6, 2005, at 1B.

⁶⁵⁹ *Woman with HIV Sentenced*, RAPID CITY J. (Rapid City, SD), Nov. 4, 2004, http://www.rapidcityjournal.com/news/local/article_59a9d4d6-bfc3-511b-98b9-106b8fb035b8.html.

⁶⁶⁰ Rhonda Smith, *S.D. gay couple faces prison for exposing others to HIV*, WASH. BLADE, May 24, 2002, <http://www.aegis.org/NEWS/wb/2002/WB020512.html>.

⁶⁶¹ John-John Williams, *supra* note 279.

⁶⁶² *Id.*

⁶⁶³ S.D. CODIFIED LAWS § 22-6-6.1(1939).

⁶⁶⁴ § 22-6-1(6).

⁶⁶⁵ § 22-18-31(2).

⁶⁶⁶ § 22-18-31(2).

Neither the intent to transmit HIV nor actual transmission is required.⁶⁶⁸

An individual prosecuted for HIV exposure has an affirmative defense if she/he can prove that the individual exposed to HIV (1) was aware of her/his HIV-positive status, (2) knew that HIV infection could result from the exposure in question, and (3) consented to exposure with knowledge of these risks.⁶⁶⁹

Sharing non-sterile needles or syringes can result in imprisonment.

South Dakota's "intentional exposure" laws explicitly prohibit HIV-positive drug users from sharing used needles and syringes. It is a Class 3 felony for an individual aware that she/he is HIV-positive to intentionally expose another to infection by dispensing, delivering, exchanging, selling, or in any other way transferring to another any non-sterile "intravenous or intramuscular drug paraphernalia" that she/he has contaminated.⁶⁷⁰ In South Dakota, Class 3 felonies are punishable by up to fifteen years in prison and possibly a \$30,000 fine.⁶⁷¹

Neither the intent to transmit HIV nor actual transmission is required.⁶⁷²

Under the terms of this statute, "intravenous or intramuscular drug paraphernalia" is defined as any equipment, product, or material of any kind which is peculiar to and marketed for use in injecting a substance into the human body.⁶⁷³ To avoid prosecution, HIV-positive drug users should not share needles, syringes, or any other devices used to inject drugs into the body. Presumably, if these items are sterilized before transfer to another, prosecution may be avoided. However, it may be difficult to prove that a needle or syringe was sterile at the time of transfer to another without witnesses or documentation.

An individual prosecuted under this needle-sharing law has a defense if she/he can prove that the individual exposed to HIV (1) was aware of her/his HIV-positive status, (2) knew that HIV infection could result from sharing drug paraphernalia, and (3) consented to exposure with knowledge of these risks. However, an individual's consent to HIV exposure may also be difficult to prove without documentation.⁶⁷⁴

Exposing the body of another person to blood or semen can result in imprisonment.

In South Dakota, it is also a Class 3 felony, punishable by a maximum of fifteen years in prison,⁶⁷⁵ if an individual aware that she/he is HIV-positive intentionally exposes a person to HIV infection by

⁶⁶⁷ § 22-6-1(6).

⁶⁶⁸ § 22-18-34.

⁶⁶⁹ § 22-18-33.

⁶⁷⁰ § 22-18-31(3).

⁶⁷¹ § 22-6-1(6).

⁶⁷² § 22-18-34.

⁶⁷³ § 22-18-32(3).

⁶⁷⁴ § 22-18-33.

⁶⁷⁵ § 22-6-1(6).

throwing, smearing, or otherwise causing blood or semen to come in contact that person.⁶⁷⁶ A \$30,000 fine may also be imposed.⁶⁷⁷

Actual transmission of HIV is not required.⁶⁷⁸ An individual will only be prosecuted under this prong of South Dakota's HIV exposure laws if she/he acted with the purpose of exposing another to HIV infection. This reduces the risk that HIV-positive persons will be prosecuted for accidentally exposing others to their bodily fluids. However, it is important to note that cases concerning the intent or purpose to spread HIV sometimes hinge on uncorroborated testimony from prison guards, police, or assault victims claiming they were attacked by HIV-positive persons attempting to infect them.⁶⁷⁹

No individual in South Dakota has been prosecuted for throwing or "smearing" blood or semen on another.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, should not be used as a substitute for legal advice.

⁶⁷⁶ § 22-18-31(4).

⁶⁷⁷ § 22-6-1(6).

⁶⁷⁸ § 22-18-34.

⁶⁷⁹ See, e.g., Stephanie Ramage, *Too Lenient?*, SUNDAYPAPER.COM, Aug. 30, 2009, <http://www.sundaypaper.com/More/Archives/tabid/98/articleType/ArticleView/articleId/4452/Too-lenient.aspx> (reporting on a 2008 Georgia case, where an officer bitten by an HIV-positive man during a confrontation claimed that the man screamed "I have full-blown AIDS ... You're going to die."); but see Marvin S. Arrington, *Judge Marvin S. Arrington responds to the Sunday Paper*, SUNDAYPAPER.COM, Oct. 4, 2009, <http://www.sundaypaper.com/More/Archives/tabid/98/articleType/ArticleView/articleId/4572/Default.aspx> (explaining that a state patrol police report had no mention of the alleged threat, even though a threat of HIV infection would clearly be an important piece of information for such a report. Records may actually suggest that the HIV-positive man only said "I'm HIV positive."); see also Idaho, Michigan, Massachusetts.

Tennessee Statute(s)⁶⁸⁰ that Allow for Criminal Prosecution based on HIV Status:

TENN. CODE ANN. § 39-13-109

Criminal Exposure of another to HIV

It is unlawful for a person, knowing that he or she is infected with HIV, to knowingly:

- (1) engage in intimate contact with another;
- (2) transfer, donate or provide any potentially infectious body fluid or part for administration to another person in any manner that presents a significant risk of HIV transmission; or
- (3) transfer in any way to another any nonsterile intravenous or intramuscular drug paraphernalia.

“Intimate contact with another” means the exposure of the body of one person to a bodily fluid of another person in any manner that presents a significant risk of HIV transmission.

It is an affirmative defense, if proven by a preponderance of the evidence, that the person exposed to HIV knew the infected person was infected with HIV, knew the action could result in infection with HIV, and gave advance consent to the action with that knowledge. The actual transmission of HIV is not a required element of this offense.

Violation of this statute is a class C felony punishable by three to fifteen years imprisonment and a possible fine of up to \$10,000. TENN. CODE ANN. § 40-35-111.

TENN. CODE ANN. § 39-13-516

Aggravated Prostitution

A person commits aggravated prostitution when, knowing that such person is infected with HIV, the person engages in sexual activity as a business or in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity. Actual transmission of HIV is not a required for prosecution. Violation of this statute is a class C felony punishable by three to fifteen years imprisonment and a possible fine of up to \$10,000. TENN. CODE ANN. § 40-35-111.

⁶⁸⁰ It is a class C misdemeanor, punishable by a fine of no more than \$50 and/or imprisonment for no more than thirty days, for a person who is aware that she/he is infected with a sexually transmitted disease (including HIV) to knowingly expose another to that sexual transmitted disease by any means. TENN. CODE ANN. §§ 68-10-107, 68-10-101. However, because there is a specific HIV exposure statute it is unlikely that an HIV-positive person would be prosecuted under this statute.

TENN. CODE ANN. § 39-13-108***HIV; Willful Transmission; Quarantine***

The department of health, acting pursuant to § 68-10-109, shall promulgate rules regarding transmission of human immunodeficiency virus (HIV). The rules shall include specific procedures for quarantine or isolation, as may be necessary, of any person who clearly and convincingly demonstrates willful and knowing disregard for the health and safety of others, and who poses a direct threat of significant risk to the health and safety of the public regarding transmission of HIV. The department is authorized to quarantine or isolate a person within a secure facility, after exercising other appropriate measures, if the person continues to pose a direct threat of significant risk to the health and safety of the public. Any person so quarantined or isolated within a secure facility, who intentionally escapes from the facility, commits a Class E felony.

TENN. CODE ANN. § 40-35-114(21)***Enhancement Factors***

If the defendant is convicted of the offenses of aggravated rape pursuant to § 39-13-502, rape pursuant to § 39-13-503, rape of a child pursuant to § 39-13-522, or statutory rape pursuant to § 39-13-506, the defendant knew or should have known that, at the time of the offense, the defendant was HIV positive, the court shall consider this as an advisory factor in determining whether to enhance the defendant's sentence.

HIV-positive persons may face criminal penalties for engaging in sexual activities without disclosing their HIV status.

In Tennessee, it is against the law for a person who is aware that she/he is HIV-positive to engage in “intimate contact” with another without first disclosing her/his HIV status. Intimate contact is defined as any contact between the body of one person and the bodily fluids of another person in a manner that presents a significant risk of HIV transmission. Actual transmission of HIV is not necessary for a conviction.

Violating this statute is a Class C felony, punishable by three to fifteen years imprisonment as well as a possible \$10,000 fine. If an HIV-positive person is convicted under this statute she/he will also have to register as a sex offender.⁶⁸¹

⁶⁸¹TENN. CODE ANN. § 40-39-202(28) (2004).

If HIV-positive persons disclose their HIV status to sexual partners prior to engaging in activities that present a significant risk of HIV transmission is an affirmative defense. Proving disclosure can be challenging because there are rarely documents or other incontrovertible proof of disclosure and these cases often result in the defendant and complainant's versions of the story pitted against one another.

In *State v. Smith*, there was a discrepancy between the defendant's and complainant's evidence regarding whether or not the defendant had disclosed his HIV status.⁶⁸² The defendant, who was charged with criminal exposure to HIV, among other charges, testified that he told the complainant that he had HIV and assumed that the complainant had used a condom before they engaged in anal sex. The defendant maintained that he discovered later that the complainant had not used the condom. The complainant testified otherwise, noting that though the sex was consensual, the defendant never disclosed his HIV status and the complainant only found out the information from a friend afterwards.

Tennessee's criminal exposure statute requires that there be "exposure" of bodily fluids between an HIV-positive person and another that presents a significant risk of transmission, but the scope of such exposure is not defined in the statute. In *State v. Bonds*, the Tennessee Court of Appeals defined "exposure" to encompass acts that presented a risk of transmission but declined to require an exchange of bodily fluids.⁶⁸³ The HIV-positive defendant in that case was sentenced to six years for criminal exposure of HIV and an additional twenty-five years for aggravated rape.⁶⁸⁴ On appeal, the defendant argued that under the terms of the HIV exposure statute he never "exposed" the complainant to HIV because there was no proof that there had been any exchange of bodily fluids during the commission of the crime.⁶⁸⁵

The court determined that actual exposure to body fluids was not required but rather "the prosecution need only show that the defendant subjected the victim to the risk of contact with the [d]efendant's bodily fluids[...] in a manner that would present a significant risk of HIV transmission."⁶⁸⁶ Because the defendant knew of his HIV status and anally raped the victim, the court found that this presented a significant risk of HIV transmission punishable under the HIV exposure statute.⁶⁸⁷ After reviewing previous cases of HIV exposure in Tennessee, the court in *Bonds* found successful prosecutions hinged on the fact that the sex was unprotected and undisclosed, increasing the possible "risk" of transmitting HIV – as opposed to if a condom or other protection had been used.⁶⁸⁸

The prosecutions of HIV exposure involving "intimate contact" in Tennessee appear to be limited to cases where the HIV-positive defendant did not disclose her/his HIV status and a condom or other protection was not used during sexual intercourse. Other prosecutions of criminal exposure to HIV involving intimate contact include:

⁶⁸² *State v. Smith*, No. M2007-00932-CCA-R10-CO, 2008 WL 544603, at *1 (Tenn. Crim. App. May 5, 2008).

⁶⁸³ *State v. Bonds*, 189 S.W.3d 249 (Tenn. Crim. App. 2005).

⁶⁸⁴ *Id.*

⁶⁸⁵ *Id.* at 257.

⁶⁸⁶ *Id.* at 258.

⁶⁸⁷ *Id.*

⁶⁸⁸ *Id.* at 259.

- In October 2010, an HIV-positive man was charged with four counts of criminal exposure of HIV after allegedly having sex with at least two women.⁶⁸⁹
- A 24-year-old HIV-positive defendant was sentenced to fourteen years for HIV exposure and an additional six years for statutory rape for having unprotected sex with a 14-year-old. The defendant never told the minor that he was HIV-positive.⁶⁹⁰
- The HIV-positive defendant pleaded guilty to twenty-two counts of criminal exposure to HIV and was sentenced to twenty-six years and six months imprisonment.⁶⁹¹ The defendant engaged in unprotected sex with multiple men without disclosing her HIV status. Though the defendant maintained that she told her partners about her HIV status, the complainants testified otherwise. The men maintained that the defendant purposefully denied her HIV status and they did not use condoms. After ten years imprisonment the defendant was released and is currently on parole for twelve years.⁶⁹²
- A 31-year-old HIV-positive defendant pleaded guilty to criminal exposure to HIV and was sentenced to five concurrent four-year sentences. The defendant engaged in five consensual, unprotected sexual encounters with the same female and did not disclose his status.⁶⁹³
- In October 1999, an HIV-positive defendant pleaded guilty to nine counts of criminal exposure to HIV and three counts of statutory rape. He was sentenced to seventeen years imprisonment.⁶⁹⁴ The defendant failed to disclose his HIV status, and when asked by his sexual partners, denied that he had HIV.⁶⁹⁵ At least two of the women that he was intimate with tested positive for HIV but that did not matter for the purposes of the charges or prosecution.⁶⁹⁶
- In June 1999, a man was charged with statutory rape and criminal exposure to HIV.⁶⁹⁷

Though the most of the prosecutions for HIV exposure in Tennessee involve unprotected sexual activity without disclosure of HIV status, there have been multiple cases of arrests and prosecutions for criminal exposure to HIV that presented only a remote risk of transmission of HIV:

⁶⁸⁹ Claire Galofaro, "Flipper" Sensabaugh indicted on charges of criminal exposure to HIV, TRICITIES.COM, Oct. 29, 2010, <http://www2.tricitie.com/business/2010/oct/29/flipper-sensabaugh-indicted-charges-criminal-expos-ar-614364/>

⁶⁹⁰ State v. Harvey, No. W2001-01164-CCA-R3-CD, 2002 WL 1162346, at *1 (Tenn. Crim. App. May 31, 2002).

⁶⁹¹ State v. Wiser, No. M1999-02500-CCA-R3-CD, 2000 WL 1612363, at *2 (Tenn. Crim. App. Oct. 30, 2000).

⁶⁹² *Woman who spread HIV leaves prison*, TIMES GAZETTE, Dec. 31, 2008, available at <http://www.t-g.com/story/1489830.html>.

⁶⁹³ State v. Bennett, No. 03C01-9810-CR-00346, 1999 WL 544653, at *1 (Tenn. Crim. App. July 28, 1999).

⁶⁹⁴ Jones v. Carlton, No. E2008-01737-CCA-R3-HC, 2008 WL 5204434, at *1 (Tenn. Crim. App. Dec. 11, 2008) (citing State v. Jones, No. E1999-01296-CCA-R3-CD, 2001 WL 30198, at *1 (Tenn. Crim. App. Jan. 12, 2001)).

⁶⁹⁵ Jones, 2001 WL 30198, at *1.

⁶⁹⁶ *Id.*

⁶⁹⁷ *Man Allegedly Shot Girlfriend in front of Son*, DAILY NEWS JOURNAL, June 28, 1999, at X.

- In September 2009, an HIV-positive man was charged with criminal exposure to HIV, among other offenses, for spitting blood on an officer during a robbery.⁶⁹⁸
- In November 2010, a man was charged with aggravated assault and criminal exposure of another to HIV for allegedly spitting on a detention officer.⁶⁹⁹ At the time of the charges there was no evidence to prove that the man was in fact HIV-positive.
- A 34-year-old HIV-positive man was indicted on charges of criminal exposure to HIV for allegedly spitting on a police officer.⁷⁰⁰

HIV-positive persons who engage in prostitution face enhanced criminal penalties.

It is a Class C felony, punishable by three to fifteen years in prison for an HIV-positive person who knows her/his status to engage in acts of prostitution.⁷⁰¹ Conviction under this statute also results in the defendant having to register as a sex offender.⁷⁰² Actual transmission of HIV is not required for conviction. A conviction for prostitution in a case not involving HIV is a Class B misdemeanor punishable by no more than a six month sentence and/or a \$500 fine, but an HIV-positive defendant faces a thirty times greater penalty for the same offense.⁷⁰³

Under the statute, it is not required that an act that could transmit HIV occur for conviction. It is not a consideration whether condoms or other protection were used or if the HIV-positive defendant had a low viral load.

There are approximately thirty-nine women in Tennessee who have been convicted of aggravated prostitution.⁷⁰⁴

One's HIV status may also be considered an aggravating factor in sentencing.

Tennessee's sentencing enhancement notes that if a defendant knew her/his HIV status during the commission of an aggravated rape, sexual battery, rape of a child, or statutory rape, the sentencing court may consider the defendant's HIV status in sentencing.⁷⁰⁵ In order to sustain a sentence enhancement under this provision, the defendant must have known her/his HIV status during the

⁶⁹⁸ Shane Myers, *HIV Positive Burglary Suspect Spits Blood on Memphis Police Officer*, Sept. 3, 2009, available at <http://www.myeyewitnessnews.com/news/local/story/HIV-Positive-Burglary-Suspect-Spits-Blood-on/bRidZPpqH06j3lInPJlenw.csp>. Case outcome is unknown.

⁶⁹⁹ *Inmate charged with exposing jailer to HIV*, WKRN.COM, Nov. 8, 2010, <http://www.wkrn.com/Global/story.asp?S=13466403>; Chris Graham, *Family Disputes HIV Charge*, THE DAILY HERALD, Nov. 10, 2010, http://www.cdh.net/articles/2010/11/09/top_stories/01thomason.txt.

⁷⁰⁰ *HIV Case Accused of Spitting At Cop*, MEMPHIS COMMERCIAL APPEAL, July 22, 1998, at B2.

⁷⁰¹ TENN. CODE ANN. § 39-13-516 (2010).

⁷⁰² § 40-39-202(20)

⁷⁰³ § 39-13-513; § 40-35-111.

⁷⁰⁴ J.J. Stambaugh, *HIV-positive Knoxville woman a walking felony*, knoxnews.com, June 30, 2009 <http://www.knoxnews.com/news/2009/jun/30/hiv-positive-knoxville-woman-a-walking-felony/>

⁷⁰⁵ TENN. CODE ANN. § 40-35-114(21) (2008).

commission of the assault. In *State v. Banks*, Tennessee Court of Criminal Appeals vacated a trial court's imposing consecutive sentencing for a defendant convicted of aggravated kidnapping and rape because there was no trial court finding to show that the defendant knew his HIV status during the offense.⁷⁰⁶ The defendant was originally sentenced to two twenty-three year consecutive sentences, for a total of forty-six years imprisonment.

Donating blood, organs, tissue, semen, or other body fluids is prohibited.

HIV-positive persons must not donate or sell blood or any other body parts meant for transfer to another person. Actual transmission of HIV is not necessary for a conviction and a violation of this statute could result in up to fifteen years imprisonment.

HIV-positive persons may be criminally prosecuted for sharing needles.

A person who is aware that she/he is HIV-positive may be criminally liable for providing another person with any non-sterile equipment used for injecting drugs that has been used by an HIV-positive person. Actual transmission of HIV is not necessary for a conviction.

Important note: While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.

⁷⁰⁶ 2010 WL 1486897 (Tenn. Crim. App. 2010).

Texas Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

Though there is no explicit HIV criminal transmission statute in Texas, there have been prosecutions for HIV exposure under general criminal laws.

Despite the fact that Texas does not have a criminal statute for HIV exposure or transmission,⁷⁰⁷ HIV-positive persons have been prosecuted for HIV exposure under general criminal laws, including attempted murder and aggravated assault.⁷⁰⁸

Texas's aggravated assault statute makes it a felony in the second degree to cause serious bodily injury to another or use or exhibit a deadly weapon in the commission of the assault.⁷⁰⁹ A felony of the second degree carries a punishment of two to twenty years in jail and a possible fine of \$10,000.⁷¹⁰ If an aggravated assault is committed against a security officer, including a police officer, it is a felony in the first degree punishable by five to ninety-nine years in prison and a possible fine of \$10,000.⁷¹¹ Texas courts have held that HIV is a deadly weapon for the purposes of conviction under the aggravated assault statute⁷¹² and numerous prosecutions in Texas have led to incarcerating individuals whose alleged criminal conduct presented no known risk of transmitting HIV.⁷¹³

In *Mathonican v. State*, the Texas Court of Appeals found that HIV status can be considered a deadly weapon in aggravated assault and aggravated sexual assault cases. Similar to assault cases, sexual assault can be enhanced to aggravated sexual assault if the assailant used a deadly weapon in the

⁷⁰⁷ Prior to 1994, Texas had an HIV transmission statute that made it a third degree felony punishable by up to ten years in prison and a \$10,000 fine for an HIV-positive person to intentionally, and without consent, transfer bodily fluids to another. TEX. PENAL. CODE. ANN. § 22.012 (1987). In 1994, Texas deleted this statute from its code but a handful of cases were charged under the statute prior to its repeal. In 1993 an HIV-positive man was charged of exposing a sexual partner to HIV. TJ Milling, *Woman Claims Lover Hid His HIV*, HOUSTON CHRONICLE, Aug. 17, 1993, at A 13. In 1992, an AIDS activist was charged with exposure to AIDS and HIV for scratching a police officer when he was being dragged from the Houston City Council Chambers. The charges were later dropped. *Id.* Another AIDS activist was charged after he bit a man on the hand and fingers. R.A. Dyer, *Ex-AIDS Activist Charged, Biting brings up rarely used law*, HOUSTON CHRONICLE, June 11, 1992, at A31.

⁷⁰⁸ *Parker v. State*, 2010 WL 2784428 (Tex. App. 2010) (HIV positive defendant convicted and sentenced to life imprisonment for aggravated assault with a minor who tested positive for HIV); *Weeks v. State*, 834 S.W.2d 559 (Tex. App. 1992) (HIV-positive defendant was convicted of attempted murder for spitting at a prison guard and sentenced to life in prison); *Najera v. State*, 955 S.W.2d 698 (Tex. App. 1997) (HIV positive defendant convicted of aggravated sexual assault, aggravating element was that defendant's seminal fluid was considered a deadly weapon); *Lopez v. State*, 288 S.W.3d 148 (Tex. App. 2009) (remanding case in which defendant convicted of two counts of aggravated sexual assault, charged solely due to defendant's HIV status); *Hoffman v. State*, 2005 WL 1583552 (Tex. App. 2005) (affirming an eighteen-year sentence for defendant convicted of aggravated sexual assault of a child where the aggravating factor was that his seminal fluids were considered a deadly weapon); *Sierra v. State*, 2007 WL 2265170 (Tex. App. 2007) (HIV-positive defendant was convicted of three counts of aggravated sexual assault of a minor and sentenced to life imprisonment and to pay a fine of \$10,000 per count); *Suarez v. State*, 2004 WL 1660938 (Tex. App. 2004).

⁷⁰⁹ TEX. PENAL CODE ANN. § 22.02(a) (2009).

⁷¹⁰ § 12.33.

⁷¹¹ § 22.02(2)(D); § 12.32(2009).

⁷¹² *Mathonican v. State*, 194 S.W.3d 59 (Tex. App. 2006).

⁷¹³ *Degrade v. State*, No. 05-04-00218-CR, 2005 WL 165182 (Tex. Ct. App. Jan. 26, 2005); Emily Tsao, *Man Claiming HIV Accused of Biting Guard*, DALLAS MORNING NEWS, May 31, 2008, at 2B.

commission of the crime.⁷¹⁴ The HIV-positive defendant in this case was sentenced to ninety-seven years imprisonment for sexually assaulting another individual.⁷¹⁵ The original indictment held that the defendant's seminal fluid was a deadly weapon because he was HIV-positive.⁷¹⁶ The defendant appealed his case, asserting that the deadly weapon finding was erroneous because HIV status should not be considered a deadly weapon.

The court found that seminal fluid may be a deadly weapon "if the man producing it is HIV-positive and engages in unprotected sexual contact."⁷¹⁷ The court reasoned that a deadly weapon is anything that can be used to cause death or serious injury and that the seminal fluid from an HIV-positive man can cause such death or serious injury to another if that man engages in unprotected sex.⁷¹⁸ Even if the defendant did not ejaculate or otherwise expose the complainant to HIV, the court determined that the single fact that the defendant's seminal fluid "as used or as intended to be used" supported the deadly weapon finding.⁷¹⁹ This reasoning suggests that if an HIV-positive person engages in any unprotected sexual activity, regardless of the person's viral load and whether the sexual activity posed any possibility of transmission, criminal liability could follow.

Despite the scientific evidence on HIV transmission, numerous prosecutions still occur for activities that pose no risk of transmission to others. In 2006, an HIV-positive man, Campbell, was convicted of aggravated assault when he allegedly became confrontational and spat on a police officer's eyes and mouth during an arrest.⁷²⁰ The officer did not test positive for HIV, but because Campbell's saliva was considered a possible means of transmitting HIV, his charges were elevated to aggravated assault with a deadly weapon, and he was later sentenced to thirty-five years in prison.⁷²¹

In the 2009 appeal of the conviction, *Campbell v. State* presented the Texas Court of Appeals with an opportunity to revisit whether or not the saliva of an HIV-positive person could be considered a "deadly weapon." In 1992, the same court in *Weeks v. State* upheld the attempted murder conviction of an HIV-positive man for spitting on a prison guard, allegedly believing that his saliva could kill the guard.⁷²² In *Weeks* the defendant was sentenced to life in prison because he had two former felony convictions.⁷²³ Unfortunately in both the *Weeks* and *Campbell* cases the state medical witness testified that there was a theoretical possibility of HIV transmission through saliva, and the convictions were upheld.⁷²⁴

These convictions were affirmed despite the fact that no officers involved in the altercations were infected with HIV and, most importantly, saliva has never been documented to transmit HIV. The

⁷¹⁴ TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(iv).

⁷¹⁵ See *Mathonican*, 194 S.W.3d. at 6.

⁷¹⁶ *Id.* at 67.

⁷¹⁷ *Id.* at 69 citing *Najera v. State*, 955 S.W.2d 698, 701 (Tex. App. 1997)(court found that evidence of unprotected sex by an HIV-positive man, even if there was no evidence of ejaculation by defendant, is sufficient for a finding that penis and seminal fluids are deadly weapons).

⁷¹⁸ *Id.*

⁷¹⁹ *Id.* at 71.

⁷²⁰ *Campbell v. State*, No. 05-08-00736-CR, 2009 WL 2025344 (Tex. Ct. App. July 14, 2009).

⁷²¹ *Id.*

⁷²² *Weeks v. State*, 834 S.W.2d 559 (Tex. Ct. App. 1992).

⁷²³ *Id.*

⁷²⁴ *Campbell*, 2009 WL 2025344; *Weeks*, 832 S.W.2d 559.

CDC has concluded that there exists only a “remote” possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including “severe trauma, extensive tissue damage, and the presence of blood.”⁷²⁵ The CDC has also concluded that spitting alone has never been shown to transmit HIV.⁷²⁶ The Texas Court of Appeals has set a poor precedent that HIV-positive individuals may be prosecuted for conduct that bears no risk or only a remote risk of HIV transmission and may be convicted for crimes solely on the basis of HIV status.

Other cases in Texas where HIV-positive persons have been prosecuted for conduct that pose no risk of HIV transmission include:

- An HIV-positive woman spit in the face of a prison guard and was convicted of attempted capital murder and sentenced to twenty-five years imprisonment.⁷²⁷
- A 26-year-old, HIV-positive man was charged with aggravated assault after he bit a security guard during a struggle in May 2008. Police suggested that the man used his HIV status “as a deadly weapon.”⁷²⁸
- In 2005, an HIV-positive man’s twenty-five year sentence for biting a police officer was upheld by the Texas Court of Appeals.⁷²⁹ A nurse who testified at the trial said that HIV could be transmitted via the saliva in a bite and the court affirmed the conviction solely based on the nurse’s testimony.

HIV-positive persons who fail to disclose their HIV status to their sexual partners may be prosecuted for aggravated assault.

Because an HIV-positive individual’s saliva and other bodily fluids can be considered a deadly weapon in Texas, HIV-positive individuals may face aggravated assault charges for failing to disclose their HIV status to sexual partners.

In May 2009, an HIV-positive man was sentenced to five concurrent forty-five-year sentences for aggravated assault with a deadly weapon for exposing and infecting multiple women with HIV.⁷³⁰ Because he allegedly did not disclose his HIV status to his partners and did not use condoms during sex, the prosecutors charged him with aggravated assault. The man had been involved in romantic, intimate relationships with each of the women and maintained that he himself may have even been

⁷²⁵ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can HIV be transmitted through a Human Bite?*, (March 25, 2010), <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

⁷²⁶ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

⁷²⁷ Brenda Rodriguez, *Sisterhood forms in Prison AIDS Center*, SAN ANTONIO EXPRESS NEWS, Sept. 15, 1997, at 8A.

⁷²⁸ Emily Tsao, *Man Claiming HIV Accused of Biting Guard*, DALLAS MORNING NEWS, May 31, 2008, at 2B; Ben Briscoe, *Saliva Again Considered Deadly Weapon in Oak Lawn Assault Case*, PEGASUSNEWS.COM (June 6, 2008), available at <http://www.pegasusnews.com/news/2008/jun/06/saliva-again-considered-deadly-weapon-oak-lawn-ass/>.

⁷²⁹ Degrate v. State, No. 05-04-00218-CR, 2005 WL 165182 (Tex. Ct. App. Jan. 26, 2005).

⁷³⁰ Diane Jennings, *Man Who Spread HIV Gets 45 Years*, DALLAS MORNING NEWS, May 30, 2009, at 1B.

infected by one of the complainants.⁷³¹ He will be eligible for parole after twenty-two-and-a-half years.⁷³²

In July 2010, an HIV-positive man pleaded guilty to aggravated sexual assault and other aggravated assault charges for failing to disclose his HIV status to his sexual partners.⁷³³ The court found that the man's penis and seminal fluids were deadly weapons.

In October 2010, a 32-year-old HIV-positive Iraq war veteran was sentenced to three life sentences without parole for super aggravated assault of a child and continuous sexual abuse of a child.⁷³⁴ A super aggravated assault conviction requires that the jury find that the defendant used a deadly weapon on a child, in this case HIV, during the assault.

In *Henry v. State*⁷³⁵, the Texas Court of Appeals affirmed the seventy-five year sentence of an HIV-positive man for conviction for aggravated assault of a child, enhanced by two prior felony convictions. There was testimony at trial by a family nurse practitioner at the jail who had "extensive" HIV training. She testified that there was a "high risk of HIV transmission during unprotected sex" despite the fact that these broad generalizations are questionable and should not be applied to individual defendants without at least considering the viral load of a defendant and her/his medical treatment. Otherwise, "it is difficult to see how a qualified witness could reliably testify as to the risk posed by the defendant's sexual activity."⁷³⁶

HIV status as a consideration in sentencing even if there was no exposure to HIV.

HIV status can be considered admissible evidence at the punishment stage of a conviction if it is determined that HIV status is relevant to the offense. This consideration of HIV status most often involves cases of aggravated assault and aggravated sexual assault. Texas courts have found there is a "viable concern" that testimony and evidence of the defendant's HIV status should be admitted to consider the "potential long term effect of the injury" to the complainant.⁷³⁷

Though the courts have established that information concerning a defendant's life and characteristics may not be relevant to an issue of ultimate fact in the case, such considerations are appropriate when determining a sentence.⁷³⁸ In *Martinez v. State*, the defendant was sentenced to life in prison and a \$10,000 fine for aggravated sexual assault against a child. The defendant appealed

⁷³¹ Diane Jennings, *HIV-positive Frisco Man Blames Victims, Lawyers for Conviction*, DALLAS MORNING NEWS, May 28, 2009, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/052909dnmetpadieu.41c13c6.html>.

⁷³² *Id.*

⁷³³ Jennifer Emily, *HIV Carrier who Endangered Women Pleads Guilty in Midst of Trial*, THE DALLAS MORNING NEWS, July 16, 2010, available at <http://www.dallasnews.com/sharedcontent/dws/news/localnews/crime/stories/071510dnmetaidtrial.1418cf0c0.html>.

⁷³⁴ Craig Kapitan, *HIV Molester Handed Three Life Sentences*, EXPRESS NEWS, Oct. 7, 2010, available at http://www.mysanantonio.com/news/local_news/molester_with_hiv_gets_life_without_parole__times_three_104532769.html?c=y&page=1#storytop.

⁷³⁵ No. 08-05-00364-CR, 2007 WL 2405798, at *1 (Tex. Ct. App. Aug. 23, 2007).

⁷³⁶ AIDS AND THE LAW 7-26, David W. Webber ed., Aspen Publishers 4th ed. Supp. 2010 (1987).

⁷³⁷ *Suarez v. State*, No. 14-03-00441-CR, 2004 WL 1660938, at *6 (Tex. Ct. App. July 27, 2004) (quoting *Hunter v. State*, 799 S.W.2d 356, 359 (Tex. Ct. App. 1990)) (citing *Murphy v. State*, 777 S.W.2d 44, 63 (Tex. Crim. App. 1988)).

⁷³⁸ *Sellers v. State*, No. 05-94-00033-CR, 1996 WL 223537, at *1 (Tex. Ct. App. Apr. 29, 1996) (citing *Murphy*, 777 S.W.2d at 63).

his sentence, arguing that his sentence was largely based on his HIV status. The court, upholding the conviction and the sentence, found that HIV status can be considered as victim impact evidence at sentencing.⁷³⁹ Victim impact evidence reflects the “defendant’s personal responsibility and moral guilt and is thus relevant to punishment issues.”⁷⁴⁰

Taking into account HIV status in the penalty phase has lead to increased sentences for many individuals in Texas, including those who did not expose others to HIV during the commission of the crime.

In *Atkins v. State*, an HIV-positive man was convicted of attempted sexual performance of a child and, because of two prior felony convictions, was sentenced to life in prison.⁷⁴¹ The defendant in the case invited a minor to his hotel room where the defendant then sat on the bed, began undressing and fondling himself, and made suggestive overt comments referring to sex. The minor left the room and called for help before any physical or sexual contact took place. During the trial, the state presented evidence that the defendant was HIV-positive even though there was no contact that could remotely result in the transmission of HIV.

The defendant argued on appeal that his HIV-positive status had no probative value and should not have been considered for his sentencing. The court found that even though no sexual or physical contact occurred between the defendant and the minor, the defendant’s HIV status could be considered as relevant evidence of the offense and used in assessing punishment because the defendant often had unprotected sex with men. This behavior, the court held, reflected the defendant’s “willingness to expose others to the virus and his reckless disregard for the lives of others” and, as such, was pertinent to his sentencing.

In *Lewis v. State*, an HIV-positive man was sentenced to consecutive life sentences for aggravated sexual assault of a minor. The man inserted his finger into the child’s vagina and masturbated while doing so. In his appeal of his sentence, he argued that his HIV status should not have been considered because at no time did he expose the child to HIV. The defendant also asserted that the state did not produce any medical testimony regarding the defendant’s HIV status, the nature of HIV, or how the acts in question could have exposed the minor to a risk of transmission.⁷⁴² The court disagreed and found that the defendant’s HIV-positive status was properly used during the trial and sentencing because the defendant had volunteered his HIV status to the police. The court held that “the jury may consider, as a circumstance of the offense, that the appellant’s recognized HIV-positive status placed the victim of his sexual assault at risk of infection, whether or not the evidence shows any actual transmission of body fluids in a manner likely to infect.”⁷⁴³

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⁷³⁹ *Martinez v. State*, No. 05-03-01243-CR, 2004 WL 2378359, at *4 (Tex. Ct. App. Oct. 25, 2004).

⁷⁴⁰ *Id.*

⁷⁴¹ *Atkins v. State*, No. 05-07-00586-CR, 2008 WL 2815087, at *1 (Tex. Ct. App. July 23, 2008).

⁷⁴² *Lewis v. State*, No. 07-08-00290-CR, 2010 WL 2400085, at *3 (Tex. Ct. App. June 16, 2010).

⁷⁴³ *Id.* at *4.

Utah Statute(s) that Allow for Criminal Prosecution based on HIV Status:**UTAH CODE ANN. § 76-10-1309*****Enhanced penalties: HIV-positive offenders***

A person who is convicted of prostitution under Section 76-10-1302, patronizing a prostitute under Section 76-10-1303, or sexual solicitation under Section 76-10-1313 is guilty of a third degree felony if at the time of the offense the person is an HIV-positive individual, and the person:

- (1) Has actual knowledge of the fact; or
- (2) Has previously been convicted under Section 76-10-1302, 76-10-1303, or 76-10-1313.

UTAH CODE ANN. § 76-5-102.6***Propelling substance or object at a correctional or peace officer***

- (1) Any prisoner or person detained pursuant to Section 77-7-15 who throws or otherwise propels any substance or object at a peace or correctional officer is guilty of a class A misdemeanor, except as provided under Subsection (2).
- (2) A violation of Subsection (1) is a third-degree felony if:
 - (a) The object or substance is:
 - (i) blood, urine, or fecal material; or
 - (ii) the prisoner's or detained person's saliva, and the prisoner or detained person knows he or she is infected with HIV, hepatitis B, or hepatitis C; and
 - (b) The object or substance comes into contact with any portion of the officer's face, including the eyes or mouth, or comes into contact with any open wound on the officer's body.

UTAH CODE ANN. § 76-3-203(3)*Sentences for felonies*

In the case of a felony of the third degree, unless the statute provides otherwise, for a term not to exceed five years.

UTAH CODE ANN. § 76-3-301(1)(b)*Fines for persons*

\$5,000 for a felony conviction of the third degree.

HIV-positive persons convicted of sex offenses, particularly prostitution, may receive increased sentences.

Individuals with HIV in Utah should be aware that increased prison sentences may result from repeated violations of the state's prostitution laws. Utah is one of many states with a "sentence enhancement" statute that may increase penalties for HIV-positive offenders, regardless of whether they expose others to a significant risk of HIV infection. In Utah, if an individual pleads guilty or no contest to, or is convicted of any of the following offenses, she/he is required to take an HIV test:⁷⁴⁴

- Prostitution⁷⁴⁵
- Patronizing a prostitute⁷⁴⁶
- Sexual solicitation⁷⁴⁷

If the defendant tests positive and receives notice of the positive test result,⁷⁴⁸ it will be a third-degree felony, punishable by up to five years in prison⁷⁴⁹ and a \$5,000 fine⁷⁵⁰ if that HIV-positive defendant is subsequently convicted of one of the above noted offenses.⁷⁵¹ A violation of Utah's prostitution laws for those who are not HIV-positive is a Class B misdemeanor punishable by at most six months in prison⁷⁵² and a \$1,000 fine⁷⁵³ (or one year⁷⁵⁴ and a \$2,500⁷⁵⁵ fine for repeat

⁷⁴⁴ UTAH CODE ANN. § 76-10-1311 (West 2010).

⁷⁴⁵ § 76-10-1302.

⁷⁴⁶ § 76-10-1303.

⁷⁴⁷ § 76-10-1313.

⁷⁴⁸ See UTAH CODE ANN. § 76-10-1312 (West 2010) (outlining test result notification standards).

⁷⁴⁹ § 76-3-203(3).

⁷⁵⁰ § 76-3-301.

⁷⁵¹ § 76-10-1309.

⁷⁵² § 76-3-204.

⁷⁵³ § 76-3-301.

⁷⁵⁴ § 76-3-204.

⁷⁵⁵ § 76-3-301.

prostitution⁷⁵⁶ and “sexual solicitation” offenses⁷⁵⁷.) HIV-positive persons, on the basis of their status alone, may face a prison sentence four years more than that of HIV-negative persons.

In September 2010, an HIV-positive sex worker was sentenced to five years imprisonment after pleading guilty to one count of third-degree felony solicitation.⁷⁵⁸ The woman had tested positive for HIV in 2007 after her fourth prostitution conviction. She had also been imprisoned in 2008 and 2009 for prostitution.

This “penalty enhancement” law increases penalties for HIV-positive criminal defendants, regardless of whether they exposed others to a significant risk of HIV infection or if infection was even possible under the circumstances. Utah defines “prostitution” as engaging in “sexual activity” for a fee.⁷⁵⁹ “Sexual activity” includes “acts of masturbation, sexual intercourse, or any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.”⁷⁶⁰ Under this definition, which includes fingering and masturbation, felony-level prison sentences may result despite the fact that HIV cannot be transmitted in this manner.

The use of condoms or other protection is not a defense, even though they can significantly reduce risks of HIV transmission. Disclosure of HIV-positive status is not a defense on the face of the statute nor is a defendant’s viral load taken into consideration, even though a low viral load (amount of active HIV virus in the human bloodstream) can significantly reduce transmission risks.

Sexual activity is not required for prosecution. Conviction of “loitering” in a public place for the purpose of being hired for prostitution also results enhanced penalties.⁷⁶¹ Because “patronizing” a prostitute is penalized, offering, agreeing, or entering a house of prostitution for the purpose of having sex for a fee is a third-degree felony even if no sexual act took place.⁷⁶² Offering or agreeing to commit any sexual activity for a fee also triggers sentence enhancement for repeat, HIV-positive offenders.⁷⁶³ There is no consideration given to whether the act, if it had been completed, would have a risk of HIV exposure or transmission. The statute assumes that the completed act would pose a risk of HIV transmission.

HIV-positive sex workers in Utah should be aware that being an “inmate of a house of prostitution” also triggers enhanced sentencing.⁷⁶⁴ Presumably, this means that any sex worker in a commercial sex establishment may face up to five years in prison,⁷⁶⁵ regardless of whether they engaged in sexual activities posing significant risk of HIV infection.

⁷⁵⁶ § 76-10-1302(2).

⁷⁵⁷ § 76-10-1313(2).

⁷⁵⁸ Stephen Hunt, *HIV Positive Prostitute Sent to Prison*, SALT LAKE TRIBUNE, Sept. 17, 2010, <http://www.sltrib.com/sltrib/home/50306321-76/hiv-positive-prison-patwardhan.html.csp>.

⁷⁵⁹ § 76-10-1302(1)(a).

⁷⁶⁰ § 76-10-1301(4).

⁷⁶¹ § 76-10-1302(1)(c).

⁷⁶² § 76-10-1303.

⁷⁶³ § 76-10-1313.

⁷⁶⁴ § 76-10-1302(1)(b).

⁷⁶⁵ § 76-10-1301(1).

HIV status may be taken into consideration during sentencing.

Transmission of HIV may be a factor in sentencing decisions. In *State v. Scott*, a man with chlamydia pleaded guilty to three counts of sodomy on a child for sexually abusing a six-year-old girl.⁷⁶⁶ Each count came with the possibility of a ten-year-to-life sentence.⁷⁶⁷ On appeal, the defendant argued that the trial court should not have considered his victim's infection with chlamydia as an "aggravating factor" when deciding whether to impose concurrent sentences (prison sentences served at the same time) or consecutive sentences (prison sentences served one after the other), because it was not certain that the defendant was the source of the victim's infection.⁷⁶⁸ The Court of Appeals of Utah disagreed, as evidence suggested that the defendant had chlamydia, and the transmission of a sexually transmitted infection (STI) to a sexual abuse victim was a valid aggravating factor.⁷⁶⁹ *Scott* suggests that the transmission of HIV may be taken into consideration for sentencing purposes and result in consecutive sentences for conviction of multiple charges of a sex offense.

There are currently proposals in Utah that would increase penalties for HIV-positive persons even if such persons were unaware of their HIV status.

As of the summer 2010, Utah's statutes related to HIV exposure were being considered for amendment that would broaden their terms.⁷⁷⁰ A proposed senate bill would eliminate any requirement that an HIV-positive person have a previous conviction for a prostitution-related offense or knowledge of an HIV-positive test result.

Under this new law, if enacted, any person who committed a prostitution-related offense and knew or *should have known* that she/he was HIV-positive would receive a penalty enhancement. A court apparently could take into consideration highly private information concerning a defendant's sexual or health history to determine whether that defendant "should have known" that she/he was HIV-positive.

Assaulting a police or correctional officer with bodily fluids can result in increased prison sentences.

Utah has an HIV exposure statute specifically addressing situations where HIV-positive inmates throw or otherwise expose others to their bodily fluids during confrontations. Prison guards and other correctional employees involved in altercations with inmates often allege that they were attacked by HIV-positive inmates who intentionally spat at them or exposed them to their bodily fluids.

In Utah, it is a Class A misdemeanor, punishable by one year in prison⁷⁷¹ and a \$2,500⁷⁷² fine, if any prisoner or any person⁷⁷³ throws or otherwise propels any substance or object at a police or correctional officer.⁷⁷⁴

⁷⁶⁶ *State v. Scott*, 180 P.3d 774, 775 (Utah Ct. App. 2008).

⁷⁶⁷ *Scott*, 180 P.3d at 776.

⁷⁶⁸ *Id.* at 777.

⁷⁶⁹ *Id.*

⁷⁷⁰ See S.B. 155, 59th Leg., 2010 Gen. Sess. (Utah 2010).

⁷⁷¹ UTAH CODE ANN. § 76-3-204(1) (West 2010).

This offense becomes a third-degree felony, punishable by up to five years in prison⁷⁷⁵ and a \$5,000 fine,⁷⁷⁶ if the object or substance is (1) blood, urine, or feces, or (2) the saliva of a person who knows she/he is infected with HIV, hepatitis B, or hepatitis C, and any of these substances come into contact with an officer's face, eyes, or mouth, or an open wound on the officer's body.⁷⁷⁷ Neither the intent to transmit HIV nor actual transmission is required.

The CDC has concluded that there exists only a "remote" possibility that HIV could be transmitted through a bite and such transmission would have to involve various aggravating factors including "severe trauma, extensive tissue damage, and the presence of blood."⁷⁷⁸ The CDC has also concluded that spitting alone has never been shown to transmit HIV.⁷⁷⁹ Utah's statute ignores these scientific findings, leading to potential prosecutions for behavior that has at best a remote possibility of transmitting HIV.

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⁷⁷² § 76-3-301.

⁷⁷³ Pursuant to UTAH CODE ANN. § 77-7-15 (West 2010).

⁷⁷⁴ UTAH CODE ANN. § 76-5-102.6.

⁷⁷⁵ § 76-3-203(3).

⁷⁷⁶ § 76-3-301.

⁷⁷⁷ § 76-5-102.6.

⁷⁷⁸ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can HIV be transmitted through a Human Bite?*, (March 25, 2010), <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

⁷⁷⁹ CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Transmission, Can HIV be transmitted by being spit on by an HIV infected person?*, (March 25, 2010) <http://www.cdc.gov/hiv/resources/qa/transmission.htm>.

Vermont Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

There is no HIV-specific criminalization statute but there has been at least one case prosecuted under general criminal laws.

There are no statutes explicitly criminalizing HIV transmission or exposure in Vermont. However, at least one person has been prosecuted for HIV exposure under general criminal laws. In Vermont, a 31-year-old, HIV-positive man was charged with aggravated assault for spitting in the face of a police officer in July 2009.⁷⁸⁰

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⁷⁸⁰ Brent Curtis, *AIDS Patient Faces Felony for Spitting at City Officer*, RUTLANDHERALD.COM, July 30, 2009, <http://www.rutlandherald.com/apps/pbcs.dll/article?AID=/20090730/NEWS01/907300377/>.

Virginia Statute(s) that Allow for Criminal Prosecution based on HIV Status:**VA. CODE ANN. § 18.2-67.4:1(A)*****Infected sexual battery; penalty***

Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus, or anal intercourse with the intent to transmit the infection to another person is guilty of a Class 6 felony.

VA. CODE ANN. § 18.2-67.4:1(B)***Infected sexual battery; penalty***

Any person who, knowing he is infected with HIV, syphilis, or hepatitis B, has sexual intercourse, cunnilingus, fellatio, anallingus, or anal intercourse with another person without having previously disclosed the existence of his infection to the other person is guilty of a Class 1 misdemeanor.

VA. CODE ANN. § 32.1-289.2***Donation or sale of blood, body fluids, organs and tissues by persons infected with human immunodeficiency virus***

Any person who donates or sells, who attempts to donate or sell, or who consents to the donation or sale of blood, other body fluids, organs and tissues, knowing that the donor is, or was, infected with human immunodeficiency virus, and who has been instructed that such blood, body fluids, organs or tissues may transmit the infection, shall be guilty, upon conviction, of a Class 6 felony.

This section shall not be construed to prohibit the donation of infected blood, other body fluids, organs and tissues for use in medical or scientific research.

VA. CODE ANN. § 18.2-10(f)***Punishment for conviction of felony; penalty***

Class 6 felonies are punishable by either (1) a term of imprisonment of one to five years, or (2) in the discretion of the jury or the court trying the case without a jury, confinement in jail for up to one year and/or a fine of up to \$2,500.

VA. CODE ANN. § 18.2-11***Punishment for conviction of misdemeanor***

Class 1 misdemeanors are punishable by confinement in jail for up to one year and/or a fine of up to \$2,500.

Virginia criminalizes a broad range of sexual activities for people living with HIV.

Virginia criminalizes oral sex, anal sex, and vaginal sex for people living with HIV. If an individual knows he or she has HIV and engages in these activities with the intent to transmit HIV, she/he is guilty of a felony that can result in up to five years of prison and a fine of up to \$2,500. Even if the individual has no intent to transmit HIV, an individual who knows she/he has HIV is guilty of a misdemeanor if she/he engages in oral sex, anal sex, or vaginal sex without disclosing her/his HIV-status to her/his partner.

This statute may disproportionately punish an individual for being HIV-positive, regardless of whether the alleged conduct involved a risk of transmission. There is no exception for condom use and no consideration of the defendant's viral load, both of which might significantly reduce the risk of transmission. There is also no exception or consideration under the statute for situations in which both partners are HIV-positive.

An individual living with HIV must disclose her/his HIV status to a partner before engaging in certain sexual activities.

The misdemeanor statute requires the prosecution to demonstrate that the individual did not disclose her/his HIV status. Under the felony statute there is no requirement of disclosure but the prosecution must prove that the defendant intended to transmit HIV. The difference between the statutes rests in the defendant's state of mind which could be difficult to prove under the felony statute. Hypothetically, a person could disclose her/his HIV-positive status to her/his partner but still be prosecuted under the felony provision if there were elements to suggest that the person intended to transmit HIV.

Cases of arrests and prosecutions under Virginia's statute include:

- In October 2010, a man was charged with one count of felony infected sexual battery for allegedly exposing women to HIV without disclosing his status.⁷⁸¹
- In 2008, a man was sentenced to nine months imprisonment after being convicted under Virginia's misdemeanor infected sexual battery statute.⁷⁸² The man had a sexual relationship with a woman and did not tell her his status until months into the relationship. After the disclosure, they continued their sexual relationship but she pressed charges against him after the relationship ended.

Virginia criminalizes the donation or sale of blood, bodily fluids, tissue, and organs of an HIV-positive person.

Involvement in the sale of blood, bodily fluids, tissue, and organs of a person with HIV is prohibited if the person knows the donor is or was HIV-positive and the materials may transmit HIV.

⁷⁸¹ *Man Accused of Infecting Women with HIV*, WTVR.COM, Oct. 15, 2010, available at <http://www.wtvr.com/news/wtvr-man-infecting-women-with-hiv-101410,0,2366386.story>.

⁷⁸² Keith Epps, *Keeping HIV Secret Lands Man in Jail*, FREDRICKSBURG.COM, March 27, 2008, <http://fredericksburg.com/News/FLS/2008/032008/03272008/366616>.

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Washington Statute(s) that Allow for Criminal Prosecution based on HIV Status:**WASH. REV. CODE ANN. § 9A.36.011*****First-Degree Assault***

A person is guilty of assault in the first degree if she/he, with intent to inflict great bodily harm, administers, exposes, or transmits to another, HIV. First-degree assault is a Class A felony.

WASH. REV. CODE ANN. §§ 9.94A.510, 9.94A.515, 9.94A.550***Class A Felony***

In Washington State, a Class A felony carries a sentencing range of 93-318 months in prison and a fine of up to \$50,000.

In Washington, any person may be imprisoned if she/he engages in activity with the “intent” to expose another to HIV.

Washington’s HIV assault provision makes it a first-degree felony to expose another to HIV with the intent to inflict bodily harm. The statute fails to define what activity “administers” or “exposes” others to HIV. This may allow prosecutors to interpret the statute to include activities in which there is little to no risk of HIV transmission, such as spitting, biting, oral sex, sexual activity with the use of a condom, or performing or submitting to medical procedures. It also fails to account explicitly for an individual’s viral load and as such an individual may be prosecuted under the statute even if her/his low viral load makes transmission extremely unlikely.

The Court of Appeals has rejected challenges to this statute on the basis that it violates the equal protection clauses of the U.S. and Washington constitutions, the privileges and immunities clause of the Washington constitution, and that it is unconstitutionally vague.⁷⁸³ In *State v. Stark*, the Court of Appeals rejected an argument that the statute was unconstitutionally vague, and stated that “expose” refers to “conduct that can cause another person to become infected with the virus,” an interpretation that provides no real guidance on defining such conduct.⁷⁸⁴

The Court of Appeals in both *Stark* and *State v. Whitfield* provide limited guidance that sexual activity with a condom may not constitute exposure under Washington’s criminalization statute. In *Stark*,

⁷⁸³ *State v. Whitfield*, 134 P.3d 1203, 1211-13 (Wash. Ct. App. 2006); *State v. Stark*, 832 P.2d 109, 115 (Wash. Ct. App. 1992).

⁷⁸⁴ *Stark*, 832 P.2d at 116 (affirming conviction and sentence of 163 months for HIV-positive man who engaged in unprotected oral and vaginal sex with three women). In *Stark*, the defendant was convicted under a second-degree assault statute, but the statutes were subsequently amended such that the language relating to HIV was removed from the second-degree assault statute and added to the first-degree assault statute.

the Court specifically cites the fact that the defendant “engaged in unprotected sexual intercourse” in determining that his conduct constituted exposure. However, in *State v. Whitfield* the Court of Appeals interpreted exposure to include oral, anal, and vaginal sex without a condom.⁷⁸⁵

In Washington, disclosure of HIV status and using condoms or other protection may provide a defense that there was no intent to inflict harm through exposure or transmission of HIV. The Court of Appeals in both *Whitfield* and *Stark* inferred criminal intent because the defendants did not disclose their HIV status to their sexual partners and failed to use condoms.

For prosecution under this statute, the State must also show intent to inflict great bodily harm through exposure to HIV. Despite the fact that the statute requires intent to inflict great bodily harm, some courts have interpreted that knowing one’s HIV-positive status and failing to take precautions limiting exposure is enough to constitute an intent to harm or expose another to HIV.⁷⁸⁶ In *Stark*, the Court of Appeals determined that there was sufficient evidence of intent to harm because there was evidence that the defendant knew he had HIV and that it was *possible* to transmit HIV through oral and vaginal sex with women, and the defendant engaged in such conduct without the use of a condom or other types of protection.⁷⁸⁷ Similarly, in *Whitfield*, the Court of Appeals found sufficient evidence of intent based on the fact that the defendant knew he was HIV-positive; had been counseled on how HIV was transmitted, how to prevent transmission during sex, denied or failed to disclose that he had HIV or STIs to his sexual partners, and insisted on not using a condom or other type of protection.⁷⁸⁸ In both cases defendants made statements indicating a desire to infect other individuals and that this evidence also lead to the court’s determination of intent.⁷⁸⁹ Similarly, in *State v. Ferguson*, a defendant convicted under this statute not only knew his status and knew he could transmit HIV to partners, but also made comments to acquaintances indicating that he did not care if his partners were infected and that he wanted to infect his partners.⁷⁹⁰

However, recently there has been a prosecutorial trend in Washington where if someone is HIV-positive and engages in sexual activities that may be enough to arrest her/him for assault. The following cases had absolutely no evidence to suggest that the defendant intended to expose or transmit HIV to others but only engaged in sexual activities allegedly without disclosing her/his status:

- In October 2010, a 19-year-old perinatally infected college student was charged with first-degree assault for having sex with his long-term girlfriend.⁷⁹¹

⁷⁸⁵ *Whitfield*, 134 P.3d at 1214 (Wash. Ct. App. 2006) (affirming conviction on 17 counts of first-degree assault and sentence of 178 years in prison for HIV-positive man who engaged in anal, oral, and vaginal sex with seventeen women, usually without a condom, with transmission occurring in five of the 17 cases).

⁷⁸⁶ *See id.*; *Stark*, 832 P.2d at 111, 114 (Wash. Ct. App. 1992).

⁷⁸⁷ *See Whitfield*, 134 P.3d at 1213-14.

⁷⁸⁸ *See Stark*, 832 P.2d at 114.

⁷⁸⁹ *See Whitfield*, 134 P.3d at 1213; *Stark*, 832 P.2d at 114.

⁷⁹⁰ *See State v. Ferguson*, 15 P.3d 1271, 1272-74 (Wash. 2001).

⁷⁹¹ *HIV-Infected Man Faces Assault Counts*, KHQQ6.com, Oct. 13, 2010.

- Also in October 2010, a 23-year-old, HIV-positive man was sentenced to 87 months imprisonment after pleading guilty to first-degree assault charges for allegedly not disclosing his status to a man that he met on manhunt.com, a dating website.⁷⁹²
- In June 2009, a man with HIV pleaded guilty to first-degree assault after he failed to disclose his HIV status to a bisexual married man with whom he had an affair with after meeting online.⁷⁹³

Disclosure of one's HIV status may be a defense to prosecution.

Washington's statute does not explicitly provide an exception for disclosure or consent but, as noted above, there is supporting case law that disclosure may be considered as a possible defense against intent to transmit HIV though disclosure is not an absolute defense. In *State v. Ferguson*, the Washington Court of Appeals left open the question of whether consent could constitute a defense but held that, even if consent is a defense, the partner must have "knowledge of all relevant facts," including whether the defendant is using a condom.⁷⁹⁴ In *Ferguson*, the defendant's partner knew the defendant was living with HIV before consenting to sex, but did not know that the defendant removed his condom during sex.⁷⁹⁵ The court refused to determine whether consent could be a defense to the statute, but held that, even if consent were a defense, the partner did not consent in these circumstances because she did not consent to sex without a condom.⁷⁹⁶

Upon conviction of multiple offenses, sentences for each offense can be imposed consecutively, resulting in lengthy incarceration.

In Washington, Class A felonies carry a maximum penalty of life in prison and a \$50,000 fine. Prison sentences must run consecutively, meaning that sentences for every offense must be served one after the other. In *State v. Whitfield*, although the trial court interpreted multiple incidents of sexual activity with one partner as a single offense,⁷⁹⁷ the activity with each of seventeen partners resulted in conviction of seventeen Class A felony counts and seventeen consecutive sentences, resulting in a 178-year sentence. The Court of Appeals rejected his argument that this amounted to cruel and unusual punishment.

HIV status may be a factor in sentencing.

In *In re Farmer*, the Washington Supreme Court imposed a sentence of almost eight years for a defendant because of his HIV-positive status upon his conviction of sexual exploitation of a minor

⁷⁹² *HIV-Positive Man Sentenced for Assault*, THE SPOKESMAN REVIEW, Oct. 12, 2010, available at <http://www.spokesman.com/stories/2010/oct/12/hiv-positive-man-sentenced-assault/>.

⁷⁹³ Meghan Cuniff, *HIV-Positive Man Faces New Charge*, SPOKESMAN REV. (Spokane, Wash.), July 14, 2009, at A5.

⁷⁹⁴ *State v. Ferguson*, No. 21329-0-II, 1999 WL 1004992, at *6-*7 (Wash. Ct. App. Nov. 5, 1999). In *Ferguson*, the defendant was convicted under a second degree assault statute, but the statutes were subsequently amended such that the language relating to HIV was removed from the second degree assault statute and added to the first degree assault statute.

⁷⁹⁵ See *id.*

⁷⁹⁶ See *id.*

⁷⁹⁷ See *Whitfield*, 134 P.3d at 1209.

and patronizing a juvenile prostitute.^{798 799} The court held that the defendant's knowledge or belief that he was HIV-positive and might transmit the virus to the two minors constituted deliberate, cruel, and malicious conduct that justified the ninety-month sentence.⁸⁰⁰

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⁷⁹⁸ Farmer was one of the first people in the state to under-go a court ordered blood test to determine if he was HIV-positive. Such testing was later ruled unconstitutional by the Washington Supreme Court. Debra Carlton Harrell, *Steven Farmer, Central Figure in Case on HIV Testing, Dies*, SEATTLE POST INTELLIGENCER, Sept. 30, 1995, at B2.

⁷⁹⁹ 835 P.2d 219, 220 (Wash. 1992) (per curiam).

⁸⁰⁰ *See id.* Although the supreme court specified that the defendant knew or believed he had AIDS, previous opinions were amended to state that the court was relying on the fact that he knew or believed he "was HIV-positive." *See State v. Farmer*, 812 P.2d 858 (Wa. 1991).

West Virginia Statute(s) that Allow for Criminal Prosecution based on HIV Status:**W. VA. CODE ANN. §§ 16-4-20, 16-4-26*****Communication of disease***

It shall be unlawful for any person suffering from an infectious venereal disease to perform any act which exposes another person to infection with said disease, or knowingly to infect or expose another person to infection with said disease. (“Venereal disease” is not defined, but HIV is identified as “potentially sexually transmittable.” See W. VA. CODE §§ 16-4-1, 64-7-17).

Violation of this statute is punishable by \$100 and thirty days in jail.

West Virginia has a communicable disease statute that may criminalize HIV exposure.

West Virginia’s Public Health Code imposes penalties of up to \$100 and thirty days in jail for knowingly exposing others to venereal diseases. “Venereal disease” is not defined but HIV is considered sexually transmittable.⁸⁰¹ There have been no prosecutions under this statute and at the time of this publication the authors are not aware of a criminal prosecution of an individual on the basis of HIV status in West Virginia.

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⁸⁰¹ W. VA. CODE ANN. § 64-7-17 (West 2010).

Wisconsin Statute(s) that Allow for Criminal Prosecution based on HIV Status:

WIS. STAT. § 973.017(4)

Aggravating Factors; Serious sex crimes committed while infected with certain diseases

When making a sentencing decision concerning a person convicted of a serious sex crime, the court shall consider as an aggravating factor the fact that the serious sex crime was committed under all of the following circumstances: (1) At the time that he or she committed the serious sex crime, the person convicted of committing the serious sex crime had a sexually transmitted disease or acquired immunodeficiency syndrome or had had a positive HIV test; (2) At the time that he or she committed the serious sex crime, the person convicted of committing the serious sex crime knew that he or she had a sexually transmitted disease or acquired immunodeficiency syndrome or that he or she had had a positive HIV test; (3) The victim of the serious sex crime was significantly exposed to HIV or to the sexually transmitted disease, whichever is applicable, by the acts constituting the serious sex crime.

HIV-positive status may lead to higher prison sentences for sex offenses.

Wisconsin has no statute explicitly criminalizing HIV transmission or exposure but Wisconsin allows HIV-positive status during the commission of certain sex offenses to serve as an “aggravating factor” that may lead to additional prison time.

HIV status may be considered an aggravating factor in sentencing for the following offenses: first-degree or second-degree sexual assault;⁸⁰² first or second-degree sexual assault of a child;⁸⁰³ repeated acts of sexual assault of the same child;⁸⁰⁴ or sexual assault of a child placed in substitute care.⁸⁰⁵

In order for the individual’s HIV-positive status to serve as an aggravating factor sentencing, the individual must have tested positive for HIV and known of his or her positive test result, and the crime must have “significantly exposed” the victim to HIV. The statute defines “significantly exposed” as “sustaining a contact that carries a potential for transmission of a sexually transmitted disease or HIV” through the following:⁸⁰⁶

⁸⁰² WIS. STAT. § 940.225(1),(2) (West 2010).

⁸⁰³ § 948.02(1), (2).

⁸⁰⁴ § 948.025.

⁸⁰⁵ § 948.085.

⁸⁰⁶ § 973.017(4)(a)(4).

- Either (1) transmission into a body orifice or onto mucous membrane; or (2) Exchange during the accidental or intentional infliction of a penetrating wound; or (3) Exchange, into an eye, an open wound, an oozing lesion, or other place where a significant breakdown in the epidermal barrier has occurred
- Of any of the following bodily fluids: blood; semen; vaginal secretions; cerebrospinal,⁸⁰⁷ synovial,⁸⁰⁸ pleural,⁸⁰⁹ peritoneal,⁸¹⁰ pericardial,⁸¹¹ or amniotic⁸¹² fluid; or other body fluid that is visibly contaminated with blood.

Neither intent to transmit HIV nor actual transmission is required for HIV status to become an aggravating factor.

Aggravating factors may increase prison sentences by several years and even decades, depending on the specific offense and other factors considered in sentencing.⁸¹³

Mere risk of contracting HIV may lead to an increased sentence, even if the defendant is HIV-negative.

At least one Wisconsin court has considered an HIV-negative defendant's risk of contracting and transmitting HIV in sentencing. In *State v. Holloway*, a trial court sentenced a woman convicted of prostitution to the maximum term, in part because of her "high HIV risk, both to herself and others," even though the woman was HIV-negative.⁸¹⁴

Arrests and prosecutions for HIV exposure have also come under general criminal laws.

In 2008, an 18-year-old teen was charged with second-degree reckless endangerment, a felony punishable by up to ten years imprisonment, for allegedly having unprotected sex with a fellow teen and not disclosing his HIV status.⁸¹⁵ The defendant denied that he and the woman ever had sex.

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⁸⁰⁷ Cerebrospinal fluid is a bodily fluid that surrounds the brain and spinal cord.

⁸⁰⁸ Synovial fluid is bodily fluid that surrounds the joints.

⁸⁰⁹ Pleural fluid is a bodily fluid that surrounds the lungs.

⁸¹⁰ Peritoneal fluid is a bodily fluid that surrounds organs in the abdominal cavity.

⁸¹¹ Pericardial fluid is a bodily fluid that surrounds the heart.

⁸¹² Amniotic fluid is a bodily fluid that surrounds a fetus in the womb.

⁸¹³ See, e.g., WIS. SENTENCING COMM'N, SENTENCING WORKSHEET FOR FIRST DEGREE ASSAULT, available at <http://wsc.wi.gov/docview.asp?docid=3298> (last visited June 29, 2010) (showing a mitigated level offense sentencing range of probation to 20 years in prison, an intermediate level offense sentencing range of five to 30 years, and an aggravated level offense sentencing range of 10 to 40 years).

⁸¹⁴ 551 N.W.2d 841, 843 (Wis. Ct. App. 1996).

⁸¹⁵ Crocker Stephenson, *Teen Charged with Not Disclosing HIV*, JOURNAL SENTINEL, April 23, 2008, <http://www.jsonline.com/news/milwaukee/29583909.html>.

Wyoming Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute

There are no statutes explicitly criminalizing HIV transmission or exposure in Wyoming. However, in some states, HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors were not aware of a criminal prosecution of an individual on the basis of that person's HIV status in Wyoming.

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UNITED STATES TERRITORIES

American Samoa Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

No explicit statute:

There are no statutes explicitly criminalizing HIV transmission or exposure in American Samoa. However, in other jurisdictions HIV-positive people have been prosecuted for HIV exposure under general criminal laws, such as reckless endangerment and aggravated assault. At the time of this publication, the authors are not aware of a criminal prosecution of an individual on the basis of that person's HIV status in American Samoa.

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Guam Statute(s) that Allow for Criminal Prosecution based on HIV Status:**GUAM CODE ANN. tit. 9, § 28.10*****First-degree felony: prostitution with knowledge of HIV status***

A person convicted of prostitution who is determined to have known that he or she was infected with either HIV or AIDS at the time of the commission of the act shall be guilty of a felony of the first degree.

“Sexual penetration” includes an “intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.” GUAM CODE ANN. tit. 9, § 25.10(a)(9) (2009).

GUAM CODE ANN. tit. 9, § 80.30***Duration of imprisonment***

In the case of a felony of the first degree, the court shall impose a sentence of not less than five (5) years and not more than twenty (20) years.

GUAM CODE ANN. tit. 9, § 80.50***Fines***

A person who has been convicted of an offense may be sentenced to pay a fine or to make restitution not exceeding \$10,000 when the conviction is of a felony of the first or second degree.

Engaging in prostitution while HIV-positive may result in imprisonment for up to twenty years.

Guam is one of many jurisdictions with a “penalty enhancement” provision specifically targeting HIV-positive individuals who engage in prostitution.⁸¹⁶ Such provisions frequently authorize increased prison sentences for HIV-positive individuals, regardless of whether they expose others to significant risks of HIV transmission.

In Guam, engaging in, offering to engage in, or agreeing to engage in any sexual conduct in return for a fee is normally a misdemeanor punishable by up to one year in prison⁸¹⁷ and a \$1,000 fine.⁸¹⁸

⁸¹⁶ See generally GUAM CODE ANN. tit. 9, § 28.10 (2009).

⁸¹⁷ GUAM CODE ANN. tit. 9, § 80.34(a) (2009).

However, if an individual convicted of prostitution is aware of her/his HIV-positive status, prostitution is a first-degree felony punishable by five to twenty years in prison⁸¹⁹ and a \$10,000 fine.⁸²⁰ Thus, HIV-positive individuals convicted of prostitution may receive prison sentences up to twenty times higher than those of HIV-negative individuals.

This prostitution law is intended to punish both HIV-positive sex workers and HIV-positive persons who seek out the services of a sex worker.⁸²¹

Neither the intent to transmit HIV nor actual transmission is required. The use of condoms or other protection during sexual intercourse is not a defense and neither is the disclosure of HIV status to sexual partners. This statute thus fails to provide sex workers with HIV with any incentive to use condoms, because the increased sentence applies whether they do so or not.

Guam's prostitution law is a penalty enhancement statute that may severely increase the prison sentences of HIV-positive persons, regardless of whether they expose others to any risk of HIV transmission. Guam's definition of "sexual contact" includes sexual activities that do not present any risk of HIV transmission.⁸²² The territory's prostitution laws define "sexual contact" as including:

- The intentional touching of the victim's or actor's intimate parts;
- The intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.⁸²³

Under this definition, even contact between the hands of a sex worker and the clothes covering the penis of an HIV-positive man could result in penalty enhancement. Exchanging money for sexual penetration or any sexual conduct triggers elevated sentencing for any party who is HIV-positive regardless of whether the act, if completed, would have posed any risk of HIV exposure or transmission (i.e.: hand job).⁸²⁴ Applying penalty enhancement provisions to this broad definition of prostitution may lead to felony-level penalties for HIV-positive persons engaging in sexual contact that cannot transmit HIV.

Note: Under Guam's public health laws, it is unlawful for any person with a "communicable disease" to "willfully expose himself" in any public place, street or highway.⁸²⁵ Although Guam defines both HIV and AIDS as communicable diseases,⁸²⁶ this exposure statute was intended to

⁸¹⁸ § 80.50(c); § 28.10(b)(1).

⁸¹⁹ § 80.30(a).

⁸²⁰ § 80.50(a); § 28.10(b)(3).

⁸²¹ § 28.10(a) ("It is the intent of this section that guilt attach to both the payor and the recipient of the fee or pecuniary benefit that is the consideration for the act of prostitution, except that a police officer engaged in the performance of his or her official duties in the performance of an investigation of offenses committed under this chapter shall not be charged under this section.").

⁸²² § 28.10(c) (citing GUAM CODE ANN. tit. 9, § 25.10(a)(8) (2009)).

⁸²³ § 28.10(c) (citing GUAM CODE ANN. tit. 9, § 25.10(a)(8) (2009)).

⁸²⁴ *Id.*

⁸²⁵ GUAM CODE ANN. tit. 10, § 3320 (2009).

⁸²⁶ § 3301(a).

address contagious disease outbreaks, and is seemingly inapplicable to HIV exposure or transmission.

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Northern Mariana Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

There are no criminal statutes explicitly addressing HIV or STD exposure in the Northern Mariana Islands.

There are no statutes explicitly criminalizing HIV transmission or exposure in the Northern Mariana Islands. Some states have prosecuted HIV-positive people for exposing others to the virus under general criminal laws, such as those governing reckless endangerment and aggravated assault. However, at the time of this publication the authors are not aware of this type of prosecution on the basis of an individual's HIV-positive status in the Northern Mariana Islands.

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Puerto Rico Statute(s) that Allow for Criminal Prosecution based on HIV Status:

No specific statute on record.

There are no criminal statutes explicitly addressing HIV or STI exposure in Puerto Rico.

There are no statutes explicitly criminalizing HIV transmission or exposure in Puerto Rico. While some states have prosecuted HIV-positive people for exposing others to the virus under general criminal laws, such as those governing reckless endangerment and aggravated assault, at the time of publication there were no reported cases of this type of prosecution in Puerto Rico.

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U.S. Virgin Islands Statute(s) that Allow for Criminal Prosecution based on HIV Status:**V.I. CODE ANN. tit. 14, § 888**

Any person who exposes another to HIV by:

1. Engaging in unprotected sexual activity; or
2. Sharing hypodermic needles/syringes; or
3. Donating, selling, or attempting to donate or sell blood, semen, tissues, organs, or other bodily fluids for the use of another, except as determined necessary for medical research or testing;

When the infected person (1) knows at the time that he is infected with HIV, (2) has not disclosed his HIV-positive status, (3) and acts with the specific intent to infect the other person with HIV, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Evidence that the person had knowledge of his HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.

Transmission of HIV is not required.

“Sexual activity” means:

- Insertive vaginal or anal intercourse on the part of an infected male;
- Receptive consensual vaginal intercourse on the part of an infected woman with a male partner; or
- Receptive consensual anal intercourse on the part of an infected man or woman with a male partner.

“Unprotected sexual activity” means sexual activity without the use of a condom.

Engaging in unprotected sexual intercourse with the specific intent to transmit HIV is prohibited.

In the U.S. Virgin Islands, conviction and imprisonment may result from engaging in unprotected sexual intercourse, but only under very specific circumstances. It is an offense punishable by up to ten years in prison and/or a \$10,000 fine if an HIV-positive person (1) knows that she/he is HIV-positive, (2) has not disclosed HIV status to sexual partners, and (3) engages in unprotected sexual

activity with the specific intent to infect her/his partner with HIV.⁸²⁷ Evidence that an HIV-positive person knew of her/his HIV status and engaged in unprotected sex is not sufficient, however, to prove specific intent to infect.⁸²⁸ It is not clear what evidence would be required to prove intent to infect. Presumably, testimony regarding statements from an HIV-positive person that she/he wished to spread HIV could suffice.

Transmission of HIV to a sexual partner is not required for conviction.⁸²⁹

This HIV exposure law is explicitly limited to situations where HIV-positive persons expose others to activities known to transmit HIV, and where proof of intent to transmit HIV is required.

If a condom is used during sexual intercourse, then there is no violation of the statute.⁸³⁰ In addition, the law's definition of "sexual activity" includes only: "Insertive vaginal or anal intercourse on the part of an infected male; receptive consensual vaginal intercourse on the part of an infected woman with a male; or receptive consensual anal intercourse on the part of an infected man or woman with a male."⁸³¹

Under the terms of this HIV exposure law, it is a complete defense to prosecution if HIV status is disclosed to sexual partners before engaging in consensual sexual activity.⁸³² However, individuals living with HIV should be aware that disclosure of HIV status may be difficult to prove without witnesses or some form of incontrovertible evidence.

At the time of publication, the authors were not aware of any criminal prosecutions of individuals on the basis of their HIV-positive status in the U.S. Virgin Islands.

Sharing needles or syringes with the specific intent to infect another person with HIV is prohibited.

In the U.S. Virgin Islands it is an offense punishable by up to ten years in prison and/or a \$10,000 fine if an HIV-positive person (1) knows that she/he is HIV-positive, (2) has not disclosed her/his HIV status, and (3) shares a hypodermic needle or syringe with the specific intent to infect another with HIV.⁸³³

Transmission of HIV is not required for prosecution.⁸³⁴

It is a complete defense to prosecution if HIV-status is disclosed to those sharing needles/syringes with an HIV-positive person.⁸³⁵ However, individuals living with HIV should be aware that

⁸²⁷ V.I. CODE ANN. tit. 14, § 888(a) (2010).

⁸²⁸ 14, § 888(c).

⁸²⁹ § 888(d).

⁸³⁰ § 888(a) (limiting punishable conduct to "unprotected sexual activity"); § 888(e)(2) (defining "unprotected sexual activity" as sexual activity without the use of a condom).

⁸³¹ § 888(e)(1).

⁸³² § 888(a).

⁸³³ § 888(a).

⁸³⁴ § 888(d).

⁸³⁵ § 888(a).

disclosure of HIV status may be difficult to prove without witnesses or documentation. Fortunately, successful prosecution hinges on the state's ability to prove specific intent to infect another with a needle.

This needle-sharing law is a rare example of a statute explicitly limited to the unusual situation where an HIV-positive person intentionally attempts to infect others. To be convicted of HIV exposure through sharing a needle, the government must prove that the HIV-positive defendant had the specific intent to infect by sharing the needle or syringe.⁸³⁶ Evidence that an HIV-positive person knew of her/his HIV status and shared a contaminated needle is not **alone** sufficient to prove this specific intent requirement.⁸³⁷

Donating or selling blood, semen, human tissues, organs, or bodily fluids with the specific intent to infect another person is prohibited.

HIV exposure laws also prohibit HIV-positive persons from donating or selling blood, organs, and other human tissues or bodily fluids. Specifically, it is an offense punishable by up to ten years in prison and/or a \$10,000 fine if an HIV-positive person (1) knows that she/he is HIV-positive, (2) has not disclosed her/his HIV status, and (3) donates, sells, or attempts to donate or sell blood, semen, tissues, organs, or bodily fluids for the use of another, except as necessary for medical research or testing.⁸³⁸

Transmission of HIV is not required for prosecution.⁸³⁹

It is a complete defense to prosecution if HIV-status is disclosed before donation of blood, tissues, and bodily fluids.⁸⁴⁰

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⁸³⁶ § 888(c)(2010).

⁸³⁷ § 888(c).

⁸³⁸ § 888(b).

⁸³⁹ § 888(d).

⁸⁴⁰ § 888(a).

FEDERAL LAW
INCLUDING U.S. MILITARY LAW

Federal Criminal Statute(s)

18 U.S.C. § 1122***Donating or selling blood or other potentially infectious fluids or human tissues***

After testing positive for HIV and receiving actual notice of that fact, HIV-positive individuals are prohibited from knowingly donating or selling, or knowingly attempting to donate or sell, blood, semen, tissues, organs, or other bodily fluids for use by another, except as determined necessary for medical research or testing.

Transmission of HIV is not required for conviction.

Penalties

Fine of not less than \$10,000, imprisonment for not less than 1 year nor more than 10 years, or both.

Federal law explicitly addresses HIV transmission as a criminal offense in only one area, that of donation or sale of blood or other potentially infectious fluids or human tissues. Federal law provides that for conviction, the person must receive “actual notice” of testing HIV-positive,⁸⁴¹ although there is no requirement that the person be informed that HIV can be transmitted by blood, other body fluids, or human tissues. There is an exception for donations or sales that are necessary for medical research or testing.

Transmission of HIV is not required for conviction.

Because of widespread use of testing to screen HIV in donated blood (and widespread testing of donors of semen or other human body fluids or tissue), there is very little likelihood that a donor who knows of his/her HIV status will be undetected in attempting to donate or sell blood.

Although this law was originally enacted by Congress in 1994, there are no reported cases involving prosecutions under it. Many states have similar statutes, and prosecutions of individuals have been reported under those statutes.

Enhanced federal sentences for defendants with HIV

Unlike many states, Congress has not enacted a law imposing enhanced sentences for defendants in criminal cases involving conduct posing a risk of HIV transmission. The U.S. Sentencing

⁸⁴¹ 18 U.S.C. § 1122 (2006).

Commission considered issuing a guideline for enhanced sentences in cases of intentional exposure to HIV through sexual contact, and declined to do so given the rarity of such cases in the federal courts.⁸⁴² Instead, the Commission concluded that the federal guidelines' "general departure" provision,⁸⁴³ which allows for an upward departure from the guideline range for aggravating circumstances, is the appropriate way to handle cases involving HIV. As a result of recent U.S. Supreme Court decisions,⁸⁴⁴ the federal sentencing guidelines are now largely advisory, and federal judges can determine sentences based on concerns other than those set forth in the guidelines.

Very few federal cases have involved upward departure sentences involving sex offenses committed by HIV-positive defendants. For example, in *United States v. Blas*,⁸⁴⁵ the Court of Appeals for the Eleventh Circuit affirmed an "extreme conduct" upward sentence departure based on an HIV-positive defendant's numerous sexual acts with a 15-year-old girl. The defendant had not disclosed his HIV infection, although the record indicated that the defendant used a condom at least some of the time. The court found that as a result of the sexual contact, the complainant feared that she was infected with HIV, suffered other psychological trauma, and repeatedly sought HIV testing. In another federal case, *United States v. Burnett*,⁸⁴⁶ the court's use of the defendant's HIV status to impose an upward departure was much more problematic. In that case, there was no risk of HIV transmission presented by the underlying offense, public lewdness when soliciting an undercover federal officer for sex, and the court's opinion fails to determine the risk of HIV transmission involved in the sexual activity that was solicited from the undercover agent.

In at least one case, a federal judge has imposed a sentence far beyond the federal sentencing guidelines based solely on HIV status. In 2009, a federal judge in Maine determined a pregnant woman's sentence based solely off of her HIV status.⁸⁴⁷ The woman was charged with possession and use of false immigration documents, a crime for which the federal sentencing guidelines recommend 0-6 months incarceration. The woman had been incarcerated for almost 4 months at the time of her sentencing, and both the defense and prosecution recommended that the judge enter a sentence of "time served." However, the judge sentenced her to a total of 7.9 months because, he argued, the interests of the "unborn child" necessitated that the woman remain in prison past her due date so that he could ensure she received treatment to prevent HIV transmission to the child she was carrying.

Prosecution of HIV-Positive Federal Inmates for Risk of HIV Transmission to Correctional Officers

⁸⁴² U.S. SENTENCING COMM'N, REPORT TO CONGRESS: ADEQUACY OF PENALTIES FOR THE INTENTIONAL EXPOSURE OF OTHERS THROUGH SEXUAL ACTIVITY TO THE HUMAN IMMUNODEFICIENCY VIRUS 4 (1995) (concluding that HIV transmission issues are rare in federal sentences, based on a review of 235 criminal cases sentenced in fiscal year 1993 in which HIV was mentioned in only four cases, and in only one of those cases, which was not a sexual offense case, was intentional transmission of HIV an issue).

⁸⁴³ U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 5K2.0 (2009).

⁸⁴⁴ See, e.g., *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁸⁴⁵ 360 F.3d 1268 (11th Cir. 2004).

⁸⁴⁶ 545 F. Supp. 2d 1207 (N.D. Ala. 2008).

⁸⁴⁷ See Brief for National Advocates for Pregnant Women, Center for HIV Law and Policy, Verrill Dana, LLP on behalf of Medical, Public Health and HIV Experts and Advocates as Amici Curiae Supporting Respondents, *United States v. "Mrs. T"*, (No. 09-19-B-W) available at <http://www.hivlawandpolicy.org/resources/view/412>.

Although there are many convictions of HIV-positive persons, increased penalties for posing an alleged risk of HIV transmission, and matters in state courts for altercations (often involving biting or spitting) with law enforcement personnel, very few such federal cases have been reported. The reported cases tend to involve substantial prison sentences for conduct posing a limited risk of HIV transmission. One such case, *United States v. Moore*,⁸⁴⁸ involved an assault prosecution of a federal inmate for severely biting two federal corrections officers. The Court of Appeals for the Eighth Circuit concluded that HIV is not transmitted by exposure to saliva, and thus it rejected the argument that the risk of HIV transmission from a human bite is such that an HIV-positive inmate's teeth and mouth can be used as a deadly and dangerous weapon under the federal assault statute.⁸⁴⁹ But in another inmate biting case, *United States v. Sturgis*,⁸⁵⁰ the Court of Appeals for the Fourth Circuit concluded to the contrary on the question of whether saliva could transmit HIV, given the expert testimony in the record before it, and thus concluded that the inmate's HIV infection was a basis for finding that the inmate's teeth were used as a deadly weapon. The conclusion in *Sturgis* that HIV is transmitted by saliva exposure from a human bite was followed in *United States v. Studnicka*,⁸⁵¹ which resulted in a ten year prison term for an HIV-positive federal inmate's biting of a correctional officer.

Prosecution of HIV-Related Offenses in the U.S. Military

Members of the U.S. Armed Forces have been prosecuted and convicted for offenses involving sexual transmission or risk of transmission of HIV. Although applicants with HIV are barred from enlisting in the armed forces, military service members are tested for HIV, and those who test positive are retained in the service as long as they are able to meet fitness for duty standards. All prosecutions of service members for HIV-related offenses are pursuant to the Uniform Code of Military Justice, which does not include any provision explicitly addressing HIV transmission. Instead, service members with HIV have been prosecuted under general criminal assault provisions, similar to the criminal assault prosecutions of civilians with HIV under state law. Military service members have also been prosecuted under two provisions unique to the military: failing to follow safe-sex orders and for conduct prejudicial to good order. All military cases appear to involve sexual contact, and thus there is an absence of reported biting, spitting, or similar assault cases of the sort prosecuted in the civilian state courts.

Military service members with HIV been convicted of aggravated assault in cases in which HIV status is disclosed and their sexual partner consents, or in cases in which condoms are used.

Numerous military service members with HIV have been prosecuted under the aggravated assault provision contained in Article 28 of the Uniform Code of Military Justice (UCMJ).⁸⁵² Article 128

⁸⁴⁸ 846 F.2d 1163 (8th Cir. 1988). Although the court rejected the argument that the inmate's HIV infection caused his mouth and teeth to be a deadly and dangerous weapon, the court instead held that because of the risk of disease transmission and infection, other than HIV, the deadly and dangerous weapon standard nevertheless applied, and the inmate received a five year sentence to run consecutively with his current sentence.

⁸⁴⁹ 18 U.S.C. §§ 111, 1114 (2006).

⁸⁵⁰ 48 F.3d 784 (4th Cir. 1995) (affirming sentence of fourteen years based on the underlying offense, as well as a finding that the inmate committed perjury at trial concerning his knowledge of when he tested HIV-positive).

⁸⁵¹ 450 F. Supp. 2d 680 (E.D. Tex. 2006).

⁸⁵² 10 U.S.C. § 928.

defines an aggravated assault as an assault undertaken with a means likely to produce death or grievous bodily harm. Assault in this context has been defined as any contact, even that consented to by the service member's partner. Article 128 includes both attempted, as well as completed, assaults and thus an HIV-positive service member's attempt to have unprotected, consensual anal intercourse, which was abandoned before achieving penetration, has been held to be an aggravated assault.⁸⁵³ Military courts have held that there is no requirement that the defendant have a specific intent to infect a sexual partner, but instead only a general intent to engage in unprotected sex.⁸⁵⁴ Because a partner in an assault cannot, as a matter of law, consent to the assault, disclosure of HIV status is not a defense. Thus, even in cases in which a service member has disclosed his HIV status to his sexual partner, and the partner has given an informed consent to the sexual contact, the service member has been convicted of aggravated assault.⁸⁵⁵

The military courts have stretched the meaning of the "likely to produce" death or grievous bodily harm element in the aggravated assault definition to encompass circumstances that present nothing more than a highly remote possibility of harm. First, in *United States v. Johnson*,⁸⁵⁶ the Army Court of Military Review decided that "likely" need only be "more than merely a fanciful, speculative, or remote possibility," and it therefore held that unprotected anal intercourse "would have been likely to transmit a disease which can ultimately result in death." Next, in *United States v. Joseph*,⁸⁵⁷ the Court of Military Appeals further diluted the meaning of "likely." In that case, the service member had sexual intercourse with a woman on one occasion without having disclosed his HIV infection. At trial, it was undisputed that the service member used a condom, although his partner testified that the condom broke during sex. A medical expert testified that the risk of HIV transmission as a result of one act of sexual intercourse was small, and that using a condom, although not 100 percent effective in preventing HIV transmission, would be extremely effective in reducing the risk. Although this evidence clearly indicated that transmission of HIV was not likely from the one act of sexual intercourse, the court reframed the issue, concluding that "the question is not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm if it invades the victim's body."⁸⁵⁸ The court thus abandoned any requirement that the risk of HIV transmission must be likely, with the result that under *Joseph*, conviction under the Article 28 aggravated assault provision is possible for sexual contact posing any theoretical risk

⁸⁵³ *United States v. Johnson*, 30 M.J. 53, 56 (C.M.A.) (affirming conviction and sentence of confinement for six years, total forfeitures, reduction in rank, and dishonorable discharge), *cert. denied*, 498 U.S. 919 (1990).

⁸⁵⁴ *United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994) (holding that HIV-positive service member who had unprotected sex with a woman on five occasions without disclosure of his HIV status, but without evidence that he intended to infect her with HIV, was guilty of aggravated assault), *cert. denied*, 513 U.S. 1178 (1995).

⁸⁵⁵ *United States v. Bygrave*, 46 M.J. 491 (C.A.A.F. 1997) (affirming conviction on ground that informed consent to sexual intercourse with HIV-positive service member was not a defense).

⁸⁵⁶ *United States v. Johnson*, 27 M.J. 798, 801 (A.C.M.R. 1988), *aff'd*, 30 M.J. 53 (C.M.A.), *cert. denied*, 498 U.S. 919 (1990). In *Johnson*, there was no act of sexual intercourse because the case was prosecuted as an attempted assault. The court's ruling requiring "more than remote" likelihood of HIV transmission thus was a determination regarding the likelihood of transmission resulting from one instance of unprotected anal intercourse.

⁸⁵⁷ 37 M.J. 392 (C.M.A. 1993).

⁸⁵⁸ 37 M.J. 392, 397. The court's ruling may reflect the fact that Joseph's sexual partner subsequently tested positive for HIV. For a similar ruling, see *United States v. Stewart*, 29 M.J. 92 (C.M.A. 1989) (holding that unprotected sexual intercourse with a woman on numerous occasions, apparently resulting in the woman's infection with HIV, was aggravated assault in view of the probability that death would result from HIV infection).

of transmission, including sexual contact using condoms or other protection.⁸⁵⁹ Along this same line, in *United States v. Goldsmith*,⁸⁶⁰ the Air Force Court of Criminal Appeals held that unprotected sex, even if the probability of transmission was only 1 in 1,000 in each instance of sexual intercourse, is an aggravated assault. Consistent with a zero risk approach, in *United States v. Perez*,⁸⁶¹ the court held that evidence of risk of transmission was insufficient to support conviction for aggravated assault because there was no evidence that the defendant, who had had a vasectomy, could transmit HIV.

At the same time, however, the Court of Appeals for the Armed Forces has started to show receptiveness to evidence that a low viral load reduces the risk of HIV transmission below the level necessary to prove an aggravated assault. In *United States v. Dacus*,⁸⁶² the court applied *Joseph* and affirmed, based on the defendant's guilty plea, aggravated assault convictions for sexual intercourse involving inconsistent condom use. At sentencing, however, undisputed expert testimony established that the defendant's viral load was extremely low, and although he posed a risk of HIV transmission from sexual intercourse, such transmission was "very, very unlikely." A concurring opinion noted that had the defendant chosen to litigate the issue, then the evidence would not satisfy the statutory aggravated assault standard. The court used that same reasoning in *United States v. Upham*⁸⁶³ when it reversed an aggravated assault conviction based on evidence that the risk of HIV transmission was too remote because of the defendant's low viral load. Even if the use of aggravated assault charges in military cases is limited by these decisions in the future, military prosecutors can bring charges under the UCMJ for violation of safe-sex orders, as discussed below.

Military service members with HIV have been convicted of disobeying a "safe-sex order" in cases in which HIV status is not disclosed or in which condoms are not used.

HIV-positive military service members, upon testing positive, are counseled regarding the risk of HIV transmission, and are routinely issued orders from their commanding officers that they both disclose their HIV infection to their sexual partners, avoid sexual activities posing a significant risk of HIV transmission, and use condoms or other protection to reduce the risk of transmission. Violations of safe-sex orders are prosecuted under Article 90 of the UCMJ,⁸⁶⁴ which provides for court-martial of service members who willfully disobey a lawful order. Obtaining the consent of a sexual partner, after disclosure of HIV status, to sexual intercourse without a condom or other protection would be irrelevant to whether a safe-sex order was violated. Military service members with HIV have been convicted under Article 90 for using condoms but failing to disclose HIV status,⁸⁶⁵ and for both failing to use condoms or other protection and for failing to disclose.⁸⁶⁶

⁸⁵⁹ The implication in *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), that any risk of HIV transmission whatsoever is adequate to support an aggravated assault charge conflicts with the military's own HIV prevention approach, which uses "safe-sex" orders to compel service members to reduce, but not entirely eliminate, the risk of transmission. Apparently no service member has been prosecuted for an aggravated assault based on behavior (i.e. disclosure of HIV status, use of condoms) that conforms to a safe-sex order.

⁸⁶⁰ No. ACM 31172, 1995 WL 730266 (A.F. Ct. Crim. App. Nov. 20, 1995).

⁸⁶¹ 33 M.J. 1050 (A.C.M.R. 1991).

⁸⁶² 66 M.J. 235 (C.A.A.F. 2008).

⁸⁶³ 66 M.J. 83 (C.A.A.F. 2008), *aff'd* 64 M.J. 547 (C.G. Ct. Crim. App. 2006). The court did, however, affirm a conviction for a lesser offense, assault consummated by a battery.

⁸⁶⁴ 10 U.S.C. § 890(2)(2006).

⁸⁶⁵ *United States v. Negron*, 28 M.J. 775, 776–79 (A.C.M.R.) (upholding conviction for violation of safe-sex order by service member who used condom during heterosexual intercourse but did not inform partner of his HIV infection), *aff'd*, 29 M.J. 324 (C.M.A. 1989).

Service members have been convicted of violating safe-sex orders for their sexual relations with their spouses.⁸⁶⁷ Article 90 failure to obey a lawful order charges can be combined with the aggravated assault charge discussed above.⁸⁶⁸

In September 2010, an airman in Kansas was charged with aggravated assault, adultery, indecent acts for having sexual relations in public, obstruction of justice, and violating a squadron commander's orders for allegedly engaging in unprotected and undisclosed sex with various partners.⁸⁶⁹ The squadron commander's order included that the airman not engage in any sex without disclosing his HIV status and to always use condoms. If convicted on all charges the airman could face at least fifty-three years imprisonment, a dishonorable discharge, forfeiture of pay, and a reduction of rank.

Some safe-sex orders have been overly broad in prohibiting service members from engaging in behaviors that pose no risk of HIV transmission, but have nevertheless been upheld as lawful orders in subsequent prosecutions. In *United States v. Womack*,⁸⁷⁰ the service member was issued an order requiring him to take affirmative steps "during any sexual activity to protect your sexual partner from coming in contact with your blood, semen, urine, feces, or saliva."⁸⁷¹ The defendant service member was accused of having oral-genital contact with another man, and thus the order was upheld on the basis that the service member's saliva came in contact with his partner during sexual activity. At trial, two military doctors testified that "it was possible but not very likely that one could transmit the virus through his saliva incident to an act of fellatio."⁸⁷² The military judges acknowledged, however, that as more is learned about HIV, future safe-sex orders would have to be adjusted "to reflect current knowledge."

Military service members with HIV have been convicted of "conduct prejudicial to good order" for engaging in sexual activities posing a risk of HIV transmission.

Military service members with HIV have been convicted under the "general article," Article 134 of the UCMJ.⁸⁷³ This catch-all provision criminalizes all conduct "to the prejudice of the good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." Despite the absence of any reference in this provision to behaviors posing a risk of HIV transmission, or any reference to what behaviors involve a sufficient risk to constitute a violation, the Court of Military Appeals upheld its application to HIV-positive service members on the basis that the safe-sex counseling they have received provides sufficient notice regarding conduct

⁸⁶⁶ *United States v. Dumford*, 30 M.J. 137 (C.M.A.) (unprotected consensual heterosexual sex without informing partner of HIV infection), *cert. denied*, 498 U.S. 854 (1990); *United States v. Barrows*, 48 M.J. 784, 785 (Army Ct. Crim. App. 1998) (same); *United States v. Sargeant*, 29 M.J. 812, 814–17 (A.C.M.R. 1989) (same).

⁸⁶⁷ *United States v. Pritchard*, 45 M.J. 126 (C.A.A.F. 1996), *cert. denied*, 520 U.S. 1253 (1997). Prosecutions involving spousal sexual contact, or others involving regulation of service members' consensual sexual contact, particularly with civilians, could violate constitutional privacy rights, *see* *Lawrence v. Texas*, 539 U.S. 558 (2003), although no military case has directly addressed this issue.

⁸⁶⁸ *United States v. Sorey*, NMCCA 9901186, 2004 CCA LEXIS 2, 2004 WL 49093 (N-M. Ct. Crim. App. Jan. 8, 2004).

⁸⁶⁹ *Kansas Airman with HIV charged with assault for sex*, ASSOCIATED PRESS, Sept. 24, 2010 available at <http://technews.tmcnet.com/topics/associated-press/articles/104087-kan-airman-with-hiv-charged-with-assault-sex.htm>.

⁸⁷⁰ 29 M.J. 88 (C.M.A. 1989).

⁸⁷¹ 29 M.J. 88, 89. The order also required disclosure of HIV status to all health care professionals.

⁸⁷² 29 M.J. 88, 89.

⁸⁷³ 10 U.S.C. § 934 (2006).

prohibited by Article 134.⁸⁷⁴ As is the case with aggravated assault charges under the UCMJ, disclosure of HIV status and consent of the service member's sexual partner is not a defense to an Article 134 prosecution.⁸⁷⁵

⁸⁷⁴ United States v. Woods, 28 M.J. 318, 319 (C.M.A. 1989).

⁸⁷⁵ United States v. Morris, 30 M.J. 1221 (A.C.M.R. 1990) (affirming Article 134 conviction, and sentence of bad-conduct discharge, forfeiture of \$400 pay per month for three months, and restriction to the limits of his base, for service member who disclosed HIV status and used condoms approximately 25 percent of the time with female sex partner).

Illustrations and Resources of Prosecutions and Arrests based on HIV status in the United States

The following section provides illustrations of prosecutions and arrests in the United States, in addition to a fact sheet on the issues surrounding HIV criminalization.

The first two charts represent the number of cited arrests, prosecutions, and sentencing enhancements based on HIV status in various jurisdictions. The first chart is arranged by alphabetical order based on the name of the jurisdiction. The second chart is arranged according to aggregate number of prosecutions. These charts provide a snapshot of all the cases illustrated in this volume. As noted earlier, although the authors have attempted to include all reported cases from either news media sources or official judicial opinions, not all cases of HIV exposure are reported in the media and many prosecutions do not result in published judicial opinions. As a result, the cases represented here are assumed not to constitute an exhaustive representation of all HIV-related prosecutions in the U.S. but are likely only a sampling of a much more widespread, but generally undocumented, use of criminal laws against people with HIV.

The third chart in the series is an illustrative list of arrests and prosecutions in the United States for HIV exposure between 2008 – November 16, 2010.

The last resource is a fact sheet that provides a summary on the issues surrounding HIV criminalization in the United States. This fact sheet is intended to be used by advocates as informative talking points on HIV criminalization.



**Arrests and Prosecutions for HIV Exposure in the United States:
50 States, U.S. Territories, and Military Courts**

List is illustrative not exhaustive (Last Updated November 16, 2010)

Chart 1 arranged according to alphabetical order

Jurisdiction	Number of Prosecutions and Arrests ✦	Sentence Enhancements Due to HIV-Positive Status	HIV-Specific Criminal Statute?*
Alabama	1	0	No* *
Alaska	0	1	Yes (Sentence Enhancement)
Arizona	0	0	No
Arkansas	5	0	Yes
California	10	1	Yes
Colorado	6	0	Yes
Connecticut	0	0	No
Delaware	0	0	Yes
District of Columbia	0	0	No
Federal Law, including U.S. Military	25	2	Yes
Florida	10	3	Yes
Georgia	7	0	Yes
Hawaii	0	0	No
Idaho	4	0	Yes
Illinois	18	0	Yes
Indiana	15	4	Yes
Iowa	36	0	Yes
Kansas	1	0	Yes
Kentucky	3	0	Yes
Louisiana	8	1	Yes
Maine	0	0	No
Maryland	7	0	Yes
Massachusetts	4	1	No ⁺
Michigan	14	1	Yes
Minnesota	3 (and 2 civil commitments)	1	Yes

Minnesota	3 (and 2 civil commitments proceedings)	1	Yes
Mississippi	2	0	Yes
Missouri	13	1 (status was a determining factor in civil commitment)	Yes
Montana	0	0	No**
Nebraska	0	0	No
Nevada	2	0	Yes
New Hampshire	1	0	No
New Jersey	4	0	Yes
New Mexico	1	0	No
New York	4	1 (civil commitment hearing currently in progress and is based on the defendant's HIV status)	No**
North Carolina	4	0	Yes
North Dakota	0	0	Yes
Ohio	25	0	Yes
Oklahoma	6	0	Yes
Oregon	3	1	No
Pennsylvania	12	0	Yes
Rhode Island	0	0	No**
South Carolina	5	0	Yes
South Dakota	5	0	Yes
Tennessee	50 (39 for aggravated prostitution)	1	Yes
Texas	22	4	No
Utah	0	1	Yes (Sentence Enhancement)
Vermont	1	0	No
Virginia	2	0	Yes
Washington	8	1	Yes
West Virginia	0	0	No**
Wisconsin	0	1	Yes (Sentence Enhancement)
Wyoming	0	0	No
American Samoa	0	0	No
Guam	0	0	Yes
Northern Mariana Islands	0	0	No
Puerto Rico	0	0	No
U.S. Virgin Islands	0	0	Yes

Chart 2 arranged according to number of prosecutions and arrests

Jurisdiction	Number of Prosecutions and Arrests✦	Sentence Enhancements Due to HIV-Positive Status	HIV-Specific Criminal Statute?*
Tennessee	50 (39 for aggravated prostitution)	1	Yes
Iowa	36	0	Yes
Ohio	25	0	Yes
Federal Law, including U.S. Military	25	2	Yes
Texas	22	4	No
Illinois	18	0	Yes
Indiana	15	4	Yes
Michigan	14	1	Yes
Missouri	13	1 (status was a determining factor in civil commitment)	Yes
Pennsylvania	12	0	Yes
California	10	1	Yes
Florida	10	3	Yes
Louisiana	8	1	Yes
Washington	8	1	Yes
Maryland	7	0	Yes
Georgia	7	0	Yes
Colorado	6	0	Yes
Oklahoma	6	0	Yes
Arkansas	5	0	Yes
Minnesota	3 (and 2 civil commitments proceedings)	1	Yes
South Carolina	5	0	Yes
South Dakota	5	0	Yes
Idaho	4	0	Yes
Massachusetts	4	1	No ⁺
New Jersey	4	0	Yes
New York	4	1 (civil commitment hearing currently in progress and is based on the defendant's HIV status)	No **
North Carolina	4	0	Yes
Kentucky	3	0	Yes
Oregon	3	1	No
Mississippi	2	0	Yes
Nevada	2	0	Yes
Virginia	2	0	Yes
Alabama	1	0	No* **

Kansas	1	0	Yes
New Hampshire	1	0	No
New Mexico	1	0	No
Vermont	1	0	No
Alaska	0	1	Yes (Sentence Enhancement)
Arizona	0	0	No
Connecticut	0	0	No
Delaware	0	0	Yes
District of Columbia	0	0	No
Hawaii	0	0	No
Maine	0	0	No
Montana	0	0	No**
Nebraska	0	0	No
North Dakota	0	0	Yes
Rhode Island	0	0	No**
Utah	0	1	Yes (Sentence Enhancement)
West Virginia	0	0	No**
Wisconsin	0	1	Yes (Sentence Enhancement)
Wyoming	0	0	No
American Samoa	0	0	No
Guam	0	0	Yes
Northern Mariana Islands	0	0	No
Puerto Rico	0	0	No
U.S. Virgin Islands	0	0	Yes
Totals:	350	26	36

KEY

✦ Please note, there is some overlap between prosecution and sentence enhancement cases (i.e.: the defendant may be the same in both proceedings). Also, some of the prosecutions are reflective of prosecutions that occurred prior to changes in the state's criminal law related to HIV exposure (i.e.: California and Texas)

*Many prosecutions also arise under general criminal laws (i.e.: reckless endangerment, aggravated assault, etc.) even if the state has an HIV-specific statute.

**These states have "communicable" or "contagious disease" control statutes that criminalize STI exposure, which may or may not include HIV. Many of these statutes were enacted prior to the discovery of HIV and have typically not been enforced. The penalties under the statutes are limited to misdemeanors. There is no record of a case of HIV exposure ever being prosecuted under such statutes.

*Massachusetts statute, Mass. Gen. Laws Ann. 265 § 22b(f)(2008), mandates a fifteen year to life sentence for a defendant who has forced sexual intercourse with a child under 16 years old, the defendant "knew or should have known" that she/he was a carrier for an STI or STD, and that the minor could have contracted the STD or STI. This statute has not yet been applied to HIV-positive persons.



Arrests and Prosecutions for HIV Exposure in the United States, 2008–2011

(List is illustrative, not exhaustive)

DATE	STATE	TYPE OF EXPOSURE	LAW	DESCRIPTION & OUTCOME
December 2011	VA	Sex	Infected Sexual Battery	A 52-year-old man pleaded guilty to having carnal knowledge of a minor, a felony, and to a misdemeanor count of having sex with a person without disclosing he was infected with the human immunodeficiency virus. The second charge was reduced from a felony to a misdemeanor because there was no evidence that he intended to infect her, but still carries a sentence of up to 12 months in jail. http://www2.timesdispatch.com/news/2011/dec/13/tdmet02-man-with-hiv-convicted-of-having-sex-with--ar-1539505/
November 2011	IL	Biting	Criminal Transmission of HIV	A 36-year-old man is being charged with transmission of HIV, after Oak Park police said he bit a police officer's thumb and broke the skin. http://triblocal.com/oak-park-river-forest/2011/11/23/man-accused-of-biting-cop-charged-with-transmitting-hiv/
November 2011	NC	Sex	Violation of state public health laws	A 27 year-old man was arrested and charged in Raleigh with violation of state public health laws for not disclosing his HIV status before sex. http://abclocal.go.com/wtvd/video?id=8419703&syndicate=syndicate&section
October 2011	ID	Sex	Transferring body fluids containing HIV	A 50-year-old man was arrested on charges of transferring body fluids containing HIV for having sex with women without disclosing his status. If convicted he faces 15 years in prison and/or a \$5000 fine.
October 2011	IL and MO	Sex	Criminal transmission of HIV (IL) and knowingly transmitting HIV (MO)	A man was charged with one count of criminal transmission of HIV in Illinois, and three counts of knowingly transmitting HIV in Missouri, for allegedly failing to tell his female sexual partners that he was HIV positive. It is unclear whether there was any transmission involved. http://www.ksdk.com/news/article/281200/3/Police-Man-knowingly-passed-HIV-onto-others
September 2011	OH	Spitting	Felonious Assault	A woman was charged with felonious assault for allegedly spitting on people and telling them that she had HIV. Saliva cannot transmit HIV but Ohio courts have held that if blood is mixed with saliva then an HIV positive person can be convicted of felonious assault. [<i>HIV-positive woman behind bars after spitting on several bar patron</i> , Sept. 2, 2011, http://www.woio.com/story/15383123/hiv-positive-woman-spits-on]
August 2011	MD	Sex	Aggravated Assault	A man was charged with assault for allegedly failing to tell his girlfriend that he was HIV positive prior to them having sex. [Adam Bednar, <i>Man Charged with Assault for Not Disclosing HIV Status</i>

				<i>Before Sex</i> , North Baltimore Batch, Aug. 24, 2011, http://northbaltimore.patch.com/articles/crime-man-charged-with-assault-for-not-disclosing-hiv-status-before-sex]
August 2011	TN	Sex	Criminal Exposure to HIV	A 39-year-old man was charged with criminal exposure to HIV for failing to tell his live-in girlfriend that he was HIV positive. [<i>Man Charged with Exposing Girlfriend to HIV</i> , wreg.com, Aug. 17, 2011, http://www.wreg.com/news/wreg-man-charged-with-exposing-girlfriend-to-hiv-20110817,0,7741295.story]
August 2011	FL	Sex	Unlawful Acts Relating to HIV Exposure	A man was indicted on 20 counts of criminal exposure to HIV for allegedly failing to tell his female sexual partner that he was HIV positive. [Man charged with exposing woman to HIV, Jackson Sun, Aug. 11, 2011, http://www.jacksonsun.com/article/20110811/NEWS01/108110319]
August 2011	FL	Sex	Unlawful Acts Relating to HIV Exposure	A man was arrested for allegedly failing to inform his male sexual partner of his HIV status. Charges were later dropped because, for the purposes of Florida's HIV exposure statute, sexual intercourse under state law is defined as being between a man and a woman. The 2nd Circuit Court of Appeals held in a July 2011 decision that the narrow definition of "sexual intercourse" precludes using the statute in cases of same-sex consensual relationships. [<i>Charges dropped against HIV positive man accused of endangering others</i> , cfnews13.com, August 19, 2011, http://www.cfnews13.com/article/news/2011/august/297505/Charges-dropped-against-HIVpositive-man-accused-of-endangering-others]; <i>Man Charged With not telling Partner he was HIV Positive</i> , Tampa Bay Online, Aug. 5, 2011, http://www2.tbo.com/news/breaking-news/2011/aug/05/man-charged-with-not-telling-partner-he-was-hiv-po-ar-248600/]
August 2011	GA	Sex	Reckless Conduct	A man was arrested for allegedly failing to tell his girlfriend of his HIV positive status. The complainant has tested positive for HIV. [Alaya Boykin, <i>Douglas County Man Charged with Infecting Girlfriend with HIV</i> , The Atlanta Journal-Constitution, Aug. 4, 2011, http://www.ajc.com/news/douglas-county-man-charged-1075552.html#.Tjr-ZLQeal4.email]
July 2011	NY	Spitting	Reckless Endangerment	A writ of habeas corpus was denied in the case of a man of was convicted of reckless endangerment after spitting at police officers saying that he had AIDS. Spit cannot transmit HIV. The ruling mainly focused on Carmona's argument that it was a violation of his due process rights to have his medical records entered into evidence at trial. The court held that Carmona did not provide evidence that admission of his medical records violated his constitutional rights. [Carmona v. Connolly, 2011 WL 1748694 (S.D.N.Y. July 12, 2011)]
July 2011	TN	Sex	Criminal Exposure to HIV	A man was arrested for allegedly failing to tell his wife, who has since tested positive for HIV, that he was HIV positive. [Beth Burger, <i>More HIV Victims Speak Out</i> , TimesFreePress.com, July 30, 2011, http://timesfreepress.com/news/2011/jul/30/more-hiv-victims-speak-out/]
July 2011	TN	Sex	Criminal Exposure to HIV	An arrest was made in the case of a man who allegedly failed to tell his sexual partner, whom he met online, that he was HIV positive. [<i>Man Surrenders to CPD After Allegations of Criminal</i>

				<i>Exposure to HIV</i> , Eagle94.com, July 25, 2011, http://www.eagle94.com/pages/10418760.php?contentType=4&contentId=8598475 ; <i>Clarksville Woman in HIV Exposure Case Warns Others</i> , The Leaf Chronicle, June 22, 2011, http://www.theleafchronicle.com/article/20110623/NEWS01/106230315/Clarksville-woman-HIV-exposure-case-warns-others?odyssey=tab topnews text FRONTPAGE]
June 2011	OH	Biting	Felonious Assault	An HIV positive woman has been charged with felonious assault for allegedly biting a police officer. [<i>HIV Positive Woman Accused of Biting Police Officer</i> , WLWT.Com, June 24, 2011, http://www.wlwt.com/r/28344700/detail.html]
June 2011	OH	Sex	Felonious Assault	A 32-year-old man was charged with felonious assault for allegedly not disclosing his HIV status to a young man he met on a dating service. The young man has since tested positive for HIV. [Kelli Wynn, <i>Boy, 15, infected by man with HIV</i> , Dayton Daily News, June 15, 2011, http://www.daytondailynews.com/news/crime/boy-15boy-15-infected-by-man-with-hiv-1185800.html]
May 2011	FL	Biting	Criminal Transmission of HIV	A 30-year-old man was charged with criminal transmission, among other charges, for allegedly trying to bite a police officer while resisting arrest for shoplifting. The charges were dropped when it was discovered that the man did not in fact have HIV. [Marcos Restrepo, <i>Public Defender: Broward detainee charged with criminal transmission of HIV does not have the virus</i> , Florida Independent, June 10, 2011, http://floridaindependent.com/33508/public-defender-broward-detainee-charged-with-criminal-transmission-of-hiv-does-not-have-the-virus ; Marcos Restrepo, <i>More Details Emerge about South Florida criminal HIV transmission case</i> , Florida Independent, June 3, 2011, http://floridaindependent.com/32611/hiv-criminal-transmission-broward]
May 2011	OH	Sex	Felony Prostitution	A 32-year-old HIV positive sex worker was charged with felony prostitution. Most prostitution charges are misdemeanors but being HIV positive increases the penalties to felony level offenses. Prior to this incident, she was arrested and sentenced to one year in prison for felony prostitution in January 2010. [Doug Page, <i>Convicted HIV-positive prostitute arrested again</i> , Dayton Daily News, May 19, 2011, http://www.daytondailynews.com/news/crime/convicted-hiv-positive-prostitute-arrested-again--1164324.html]
April 2011	OK	Biting	Assault and Battery	An HIV positive man bit a police officer during an arrest and was charged with felony assault and battery, in addition to other charges. [Jordan Gummer, <i>HIV-Positive Inmate Accused of Biting Jailer</i> , Times Record Online, April 29, 2011, http://www.swtimes.com/news/article_976c2328-7266-11e0-9ec0-001cc4c03286.html]
April 2011	OH	Sex	Felonious Assault	After being indicted in April, a 29-year-old former wrestler was convicted Nov. 23, 2011 of 14 felonious assault counts for allegedly not telling his sexual partners that he was HIV positive. [<i>HIV positive wrestler indicted</i> , Cincinnati.com, April 25, 2011, http://news.cincinnati.com/article/20110425/NEWS010702/104260303/ , http://www.suntimes.com/news/nation/9035383-418/ex-pro-wrestler-andre-davis-convicted-in-hiv-case.html]

April 2011	NY	Sex	First Degree Reckless Endangerment	A 20-year-old man was arrested for felony reckless endangerment for allegedly failing to tell his girlfriend that he was HIV positive. The man pleaded guilty to five counts of misdemeanor reckless endangerment and was sentenced to one year imprisonment. <i>[Buffalo Man admits exposing five to HIV; faces 1 year imprisonment, Buffalo News, July 9, 2011, http://www.buffalonews.com/city/article482521.ece; Man charged for not telling of HIV infection, Wall Street Journal, April 21, 2011, http://online.wsj.com/article/APc4540a75baea4c3da2586727a82d0c86.html]</i>
April 2011	IL	Sex	Criminal Transmission of HIV	A man was charged with criminal transmission of HIV for not telling his sexual partner about his HIV condition. The man was arrested after police searched his car and found his medications for HIV and asked the man if he was HIV positive and had disclosed such information to his sexual partner, who was also in the car. <i>[Man convicted on AIDS case arrested on sex charge, The Herald News, April 21, 2011, http://heraldnews.suntimes.com/news/4941274-418/man-convicted-on-aids-case-arrested-on-sex-charge.html]</i>
April 2011	IA	Sex	Criminal Transmission of HIV	A 44-year-old HIV positive man turned himself into police on a warrant charging criminal transmission of HIV. He is accused of engaging in "intimate contact with another person" while being HIV positive. <i>[Police Reports, thonline.com, April 19, 2011, http://www.thonline.com/article.cfm?id=318509]</i>
April 2011	WI	Sex	HIV as an aggravated factor in serious sex acts	A 35-year-old HIV positive man was charged with sexual assault of a child. Wisconsin does not have an HIV specific criminal law but in making sentencing decisions, a judge may consider a person's HIV status as an aggravating factor. <i>[Man with HIV Charged with Sexual Assault of a Child, WAUSAUDAILYHERALD.com, April 19, 2010, http://wsau.com/news/articles/2011/apr/19/charges-filed-against-hiv-spreader/]</i>
April 2011	GA	Sex	Reckless Conduct	An HIV positive man was charged with reckless conduct, among other charges, for allegedly having sex with one of his students. <i>[Band teacher with HIV allegedly had sex with 15-year-old student, CBSnews.com, April 14, 2011, http://www.cbsnews.com/8301-504083_162-20053944-504083.html]</i>
March 2011	IN	Sex	Failure to Warn	A 20-year-old perinatally infected HIV-positive woman was arrested for allegedly failing to disclose her status to her sexual partner. <i>[Woman Accused of Not Telling Partner About HIV, TheIndyChannel.com, March 30, 2011, http://www.theindychannel.com/news/27362307/detail.html]</i>
March 2011	PA	Spitting, Biting	Terroristic Threats	An HIV positive man pleaded guilty to two counts of assault and one count of making terroristic threats for spitting and biting at police officers. He said that that he hoped the officers would get HIV. There is a very low chance of HIV being transmitted by blood spatter because HIV cannot live outside of the body for very long and HIV cannot be transmitted via saliva or biting. The man was eventually sentenced to six months to a year in jail and will have three months of probation. <i>[Eaton Police AIDS Assault: Man who said he had AIDS gets prison for assault on police, The Morning Call, May 13, 2011, http://articles.mcall.com/2011-05-13/news/mc-easton-police-aids-assault-20110513_1_eaton-man-</i>

				codes-officer-count-of-terroristic-threats; Todd Heywood, <i>HIV-positive PA man pleads guilty of terroristic threats</i> , Michigan Messenger, March 29, 2011, http://michiganmessenger.com/47741/hiv-positive-pa-man-pleads-guilty-of-terroristic-threats]
March 2011	ID	Sex	Transfer of Bodily Fluids Which May Contain HIV	A man was sentenced to 15 years imprisonment for not disclosing his HIV status and having unprotected sex with multiple partners. It is not known if any of the partners tested positive for HIV. The man pleaded guilty in Dec. 2010 and will be eligible for parole after two years. [<i>Boise man with HIV sentenced for unprotected sex</i> , KIVITV.com, March 25, 2011, http://www.kivitv.com/Global/story.asp?S=14323844 ; <i>Boise man charged with transferring HIV</i>
March 2011	IN	Sex	Failure to Warn	A man was sentenced to two years imprisonment for HIV non-disclosure after not telling his female sexual partner he had HIV. [<i>Man sentenced in HIV –related case</i> , Journal and Courier, March 26, 2011, http://www.jconline.com/article/20110326/NEWS03/103260327/Man-sentenced-HIV-related-case?odyssey=mod newswell text FRONTPAGE s]
March 2011	OH	Sex	Felonious Assault	A HIV+ man was charged with three counts of felonious assault for allegedly not disclosing his HIV status to his sexual partners. [Sarah Webber, <i>Vermillion man charged for spreading HIV</i> , Sandusky Register, March 17, 2011, http://www.sanduskyregister.com/news/2011/mar/17/aidscharge_ssw031711xml]
March 2011	FL	Sex	Unlawful Acts Related to HIV Exposure	An HIV+ man was charge with unlawful acts related to HIV exposure, among other charges, for allegedly raping a 13-year -old boy. [<i>Police: Man with HIV raped boy, 13</i> , wesh.com, March 14, 2011, http://www.wesh.com/r/27185799/detail.html]
March 2011	IN	Sex	Failure to warn persons at risk	A 33-year-old HIV positive man was charged with six counts failing to warn, along with other charges, for allegedly molesting a boy. [<i>Police: Man with HIV Molests 8-year-old boy</i> , indychannel.com, March 11, 2011, http://www.theindychannel.com/news/27168892/detail.html]
March 2011	MO	Bite	Reckless Exposure to HIV	An HIV positive man was charged with reckless exposure to HIV, assault on an officer, and resisting arrest for allegedly biting a police officer. [<i>Man with HIV charged with biting O’Fallon police officer</i> , kmov.com, kmov.com, March 10, 2011 http://www.kmov.com/news/local/Man-with-HIV-charged-with-biting-OFallon-Missouri-police-officer-117739179.html]
March 2011	IN	Sex	Failure to Warn	A man pleaded guilty to failing to warn his sexual partner that he was HIV positive. Failure to warn is a class D felony in Indiana, punishable by six months to three years imprisonment. [Sophia Voravong, <i>Suspect admits to sex without disclosing that he had a STD</i> , jconline.com, March 5, 2011, http://www.jconline.com/article/20110305/NEWS03/103050328/Suspect-admits-to-sex-without-disclosing-he-had-STD]
March 2011	TN	Sex	Criminal Exposure to HIV	A 28-year-old HIV-positive man was arrested for allegedly having sex without disclosing his status. [<i>Man charged with exposing 14 year old boy to HIV</i> , wmctv.com, March 2, 2011, http://www.wmctv.com/Global/story.asp?S=14176472]

March 2011	MO	Sex	Reckless Exposure to HIV	A 36-year-old man was charged with reckless exposure to HIV for allegedly engaging in sex with his girlfriend without disclosing his HIV status. [Kristin Gosling, <i>Man charged with criminal transmission of HIV</i> , ksd.com, March 3, 2011, http://www.ksdk.com/news/article/247286/3/Man-charged-with-criminal-transmission-of-HIV]
March 2011	MO	Sex	Reckless Exposure to HIV	In response to a domestic violence call, police arrested a man for criminal transmission of HIV after discovering that the man allegedly never told his girlfriend about his condition. He was charged with eight counts of reckless exposure to HIV. [Area Crime Reports, Webster-Kirkwood Times, March, 4, 2011, http://www.websterkirkwoodtimes.com/Articles-i-2011-03-04-173882.114137-Area-Crime-Reports.html#ixzz1Fe6WSUtC]
Feb. 2011	CO	Sex	Prostitution with the knowledge of being HIV positive	A woman was arrested for the felony charge, prostitution with the knowledge of being HIV positive, in addition to two misdemeanors for allegedly soliciting an undercover cop. If convicted of the HIV-specific charge she could up to face three years imprisonment. [Denver Woman Accused of Knowingly Spreading HIV, Fox News, Feb. 2, 2011, http://www.foxnews.com/us/2011/02/02/denver-prostitute-arrested-knowingly-spreading-hiv-virus/]
Jan. 2011	SC	Sex	First-degree harassment and Exposing others to HIV	A 30-year-old man was arrested for allegedly exposing others to HIV. [Man Exposed Others to HIV, Police Say, Augusta Chronicle, January 21, 2011, http://chronicle.augusta.com/news/crime-courts/2011-01-21/man-exposed-others-hiv-police-say]
Jan. 2011	KS but Military Prosecution	Sex	Aggravated assault plus violating a squadron commander's orders, adultery, indecent acts for having sexual relations in front of others, and obstruction of justice.	A US airman was sentenced to eight years imprisonment and will be dishonorably discharged after serving his time for having unprotected sex with multiple sexual partners without disclosing his HIV status. The man was found guilty on seven of eight counts of aggravated assault and violating squadron commander's orders to notify sexual partners about his HIV status and to use condoms. He was also convicted of indecent acts for having sex in front of others and adultery. None of the man's sexual partners tested positive for HIV. Upon his dishonorable discharge the man will lose his medical benefits. [Kan. Airman with HIV charged with assault for sex, Associated Press, Sept. 24, 2010, available at http://technews.tmcnet.com/topics/associated-press/articles/104087-kan-airman-with-hiv-charged-with-assault-sex.htm ; Airman gets 8 years imprisonment in HIV exposure case, AP, January 20, 2011.].
Jan. 2011	TN	Sex	Criminal Exposure of Another to HIV	A man was arrested for allegedly not telling his sexual partner that he was HIV positive. If convicted, the man could face up to three to fifteen years imprisonment. [Man charged with criminal exposure to HIV, Jacksonsun.com, January 20, 2011, http://www.jacksonsun.com/article/20110120/NEWS01/110119038/-1/newsfront2/Man+charged+with+criminal+exposure+to+HIV]
Jan. 2011	MO	Sex	Reckless Exposure to HIV	A man pleaded guilty to recklessly exposing his former girlfriend to HIV and was sentenced to ten years imprisonment. Probation was denied. The former girlfriend alleges that she did not know the defendant was HIV positive until they had broken up. She has since tested positive for HIV. [SW Missouri man pleads guilty to infecting woman with HIV, January 18, 2011, http://www.stltoday.com/news/local/crime-and-

				courts/article_ebe29ba2-2307-11e0-988e-0017a4a78c22.html
Jan. 2011	MO	Sex	Reckless Exposure to HIV	A man was charged with six counts of reckless exposure to HIV for failing to tell his sexual partner about his HIV status. He was convicted of four of the counts and sentenced to 30 years imprisonment. The partner has since tested positive. [Patrick M. O’Connell, <i>Northwoods man charged in HIV case</i> , stltoday.com, http://www.stltoday.com/news/local/crime-and-courts/article_939b9889-f8fb-5cfd-9004-430cca57ebfd.html , January 14, 2011; <i>Northwoods man sentenced in HIV case</i> , stltoday.com, , January 14, 2011, http://www.stltoday.com/news/local/crime-and-courts/article_f8017690-1fe4-11e0-936e-0017a4a78c22.html]
Dec. 2010	TN	Sex	Criminal Exposure to HIV	A man was arrested for criminal exposure to HIV and aggravated statutory rape for allegedly having sex with a 16-year-old boy. Charges were dropped in February due to a lack of probably cause. [<i>Man Accused of Statutory Rape, Exposing 16-year-old boy to HIV in Memphis</i> , abc24.com, Dec. 21, 2010, http://www.abc24.com/news/local/story/Man-Accused-of-Statutory-Rape-Exposing-16-Year-old-boy-to-HIV-in-Memphis , http://www.abc24.com/news/local/story/Man-Accused-of-Statutory-Rape-Exposing-16-Year-old-boy-to-HIV-in-Memphis]
Dec. 2010	CO	Spitting	Aggravated Assault	A man, who claimed he was HIV positive, spit on an officer’s cheek and was to be charged with second degree assault. It was later determined that the man was HIV negative. Though HIV cannot be transmitted via saliva, the Boulder police department told reporters that spitting is an “extremely serious” matter for police and all officers after being spit on receive a medical check at a hospital. [Heath Urie, <i>Boulder Police: Man said he was HIV positive before spitting on officer</i> , Daily Camera, , Dec. 21, 2010, http://www.dailycamera.com/ci_16904190?source=most_viewed]
Dec. 2010	VA	Sex	Infected Sexual Battery	A HIV-positive man pleaded guilty to carnal knowledge of a child and pleaded no contest to infected sexual battery for engaging in sex with an underage girl. The girl has since tested positive for HIV. In January 2011, he was sentenced to 50 years imprisonment. [Carrie J. Sidener, <i>Amherst man found guilty in teen sex case</i> , New Era Progress, Dec. 17, 2010, http://www2.neweraprogress.com/news/amherst-news/2010/dec/17/amherst-man-found-guilty-teen-sex-case-ar-723677/ ; Scott Marshall, <i>Man sentenced to 50 years for sex with Teen</i> , neweraprogress.com, January 12, 2011, http://www2.neweraprogress.com/news/amherst-news/2011/jan/12/man-hiv-sentenced-50-years-child-sex-charges-ar-770448]
Nov. 2010	GA	Bite	Assault by an HIV infected person on an officer	A 26-year-old HIV positive man was charged with assault by an HIV infected person on an officer for allegedly biting the officer when he refused to get his fingerprints taken. The police officer’s skin was not broken. [<i>HIV Positive man bites police officer</i> , WRCBtv.com, Nov. 20, 2010, http://www.wrcbtv.com/Global/story.asp?S=13542076]
Nov. 2010	MI	Sex	Sexual Penetration of an Uninformed Partner	A man from Grand Rapids was charged with two felony counts of sexual penetration of an uninformed partner, punishable by up to four year imprison for each count, for allegedly having sex with two women without disclosing his HIV status. He was eventually

				<p>sentenced to time already served – 181 days. [<i>GR Man sentenced for HIV sex charge</i>, wood8tv, May 10, 2011, available at http://www.woodtv.com/dpp/news/local/grand_rapids/GR-man-sentenced-for-HIV-sex-charge; <i>Instead of Jail Time, it is marriage for a man accused of not informing his partner he has AIDS</i>, mlive.com, May 11, 2011, available at http://www.mlive.com/news/grand-rapids/index.ssf/2011/05/instead_of_jail_time_it_is_mar.html; Lisa LaPlante, <i>HIV Positive Man charged with having sex, not telling partners of status</i>, wsbt.com, Nov. 15, 2010, http://www.wsbt.com/news/fox17-hivpositive-man-charged-with-h-111510,0,7741407.story; Nate Reens, <i>Grand Rapids Man jailed for allegedly failing to tell his sex partners he is HIV positive</i>, The Grand Rapids Press, Nov. 15, 2010, http://www.mlive.com/news/grand-rapids/index.ssf/2010/11/grand_rapids_man_jailed_for_al.html]</p>
Nov. 2010	GA	Sex	Reckless Conduct, HIV Infected Persons	<p>An HIV positive man was sentenced to life imprisonment plus ten years for rape and reckless conduct for allegedly raping a woman. Under the reckless conduct charge it is a felony for HIV positive persons to have sexual intercourse without first disclosing their HIV status. [Andria Simmons, <i>HIV positive man to stand trial on rape charge</i>, Atlanta Journal Constitution, Nov. 12, 2010, http://www.ajc.com/news/gwinnett/hiv-positive-man-to-738690.html; <i>HIV Positive Man Gets Life Sentence for Rape</i>, Examiner.com, http://www.examiner.com/crime-in-atlanta/hiv-positive-man-get-s-life-sentence-for-rape]</p>
Nov. 2010	NV	Sex	Intentional Transmission of HIV	<p>Two HIV-positive men were charged with intentional transmission of HIV after meeting another man through a male dating website. One of the defendant's, who has an undetectable viral load, dating profile noted that he was HIV positive and he and his co-defendant maintain that the complainant knew of their HIV positive status. Though the Nevada statute is called "intentional transmission of HIV", neither the intent to transmit nor actual transmission of HIV is required for prosecution. Conviction under the statute carries a maximum ten years imprisonment. [Interview with defendant and his attorney, names have been omitted to protect the identities of the parties (November 11, 2010)].</p>
Nov. 2010	TN	Spitting	Aggravated assault and Criminal Exposure of Another to HIV	<p>A man allegedly spit at a detention officer's face while he was in custody and was charged with aggravated assault and criminal exposure of another to HIV. The family of the man said that the guard used pepper spray to subdue the man, prompting the spitting and, moreover, that the man is not even HIV positive and as of July 2009 had not tested positive for HIV. [<i>Inmate charged with exposing jailer to HIV</i>, WKRN.com, Nov. 8, 2010, http://www.wkrn.com/Global/story.asp?S=13466403; Chris Graham, <i>Family Disputes HIV Charge</i>, The Daily Herald, Nov. 10, 2010]</p>
Nov. 2010	MO	Spitting	Assault	<p>A man who claims he has HIV was charged with two counts of assault for allegedly threatening and spitting on police officers. [Kathryn Wall, <i>Man claiming he has HIV charged in assault on officers</i>, News-Leader.com, Nov. 2, 2010, http://www.news-leader.com/article/20101102/NEWS01/11020343/Man-claiming-</p>

				he-has-HIV-charged-in-assault-on-officers]
Oct. 2010	TN	Sex	Criminal Exposure of Another to HIV	A man was charged with five counts of criminal exposure of HIV after allegedly failing to tell three of his sexual partners that he had HIV. Two of the counts were eventually dismissed. One of the women tested positive for HIV. The man pleaded guilty to three counts of criminal exposure to HIV and was sentenced to six years of probation. [Claire Galofaro, <i>Bristol man sentenced to six years probation for knowingly exposing women to HIV</i> , TriCities.com, May 23, 2011, http://www2.tricities.com/news/2011/may/23/bristol-man-sentenced-six-years-probation-knowingl-ar-1059542/ ; Kacie Breeding, <i>Bristol Man Sentenced for Exposing Women to HIV</i> , Timesnews.net, May 23, 2011, http://www.timesnews.net/article.php?id=9032324 ; Kacie Breeding, <i>Case of Bristol man accused of exposing women to HIV postponed</i> , Timesnews.net, Jan. 28, 2011, http://www.timesnews.net/article.php?id=9029413 ; Claire Galofaro, <i>"Flipper" Sensabaugh indicted on charges of criminal exposure to HIV</i> , TriCities.com, Oct. 29, 2010, http://www2.tricities.com/business/2010/oct/29/flipper-sensabaugh-indicted-charges-criminal-expos-ar-614364/]
Oct. 2010	VA	Sex	Infected Sexual Battery	A man was charged with a class 6 felony for allegedly knowingly exposing women to HIV. [<i>Man accused of infecting women with HIV</i> , WTVR.com, Oct. 15, 2010, available at http://www.wtvr.com/news/wtvr-man-infecting-women-with-hiv-101410,0,2366386.story]
Oct. 2010	WA	Sex	First Degree Assault	A 19-year-old male college student was charged with first degree assault for having sex with girlfriend without allegedly disclosing his HIV status. [<i>HIV-Infected Man Faces Assault Counts</i> , KHQQ6.com, Oct. 13, 2010] The search warrant issued for the young man's medical records were quashed and the HIV related charges were dismissed.
Oct. 2010	WA	Sex	First Degree Assault	A 23-year-old HIV positive man was sentenced to 87 months imprisonment after pleading guilty to first degree assault charges. The man engaged in anonymous, unprotected, and undisclosed sex with a man that he met on manhunt.com. [<i>HIV positive man sentenced for assault</i> , The Spokesman Review, Oct. 12, 2010, available at http://www.spokesman.com/stories/2010/oct/12/hiv-positive-man-sentenced-assault/]
Oct. 2010	OH	Sex	Felonious Assault	A man was charged with felonious assault for allegedly failing to tell his wife that he was HIV positive. When the man was admitted to the hospital with pneumonia his doctor allegedly threatened to tell the man's wife about his HIV status if the man didn't. [Tom Giambroni, <i>Husband Allegedly kept HIV a secret</i> , Morning Journal, Oct. 2, 2010, available at http://www.morningjournalnews.com/page/content.detail/id/526618/Husband-allegedly-kept-HIV-a-secret.html?nav=5006]
Oct. 2010	TX	Sex	Super aggravated assault (HIV as a deadly weapon)	A 32-year-old HIV-positive Iraq war veteran was sentenced to three life sentences without parole for super aggravated assault of a child and continuous sexual abuse of a child. A super aggravated assault conviction requires that the jury find that the defendant used a deadly weapon, in this case HIV, during the assault. [Craig

				Kapitan, <i>HIV Molester Handed three life sentences</i> , Express News, Oct. 7, 2010, available at http://www.mysanantonio.com/news/local_news/molester_with_hiv_gets_life_without_parole__times_three_104532769.html?c=y&page=1#storytop]
Sept. 2010	CA	Sex	Unprotected sexual activity with the intent to expose another to HIV	A 41-year-old HIV-positive man pleaded guilty to intentionally exposing his sexual partner to HIV. [Tomoya Shimura, <i>Gang Member Pleads Guilty to Spreading HIV</i> , Highdesert.com, Sept. 7, 2010, available at http://www.highdesert.com/articles/spreading-21626-vvdailyexpress-gang-victorville.html]
Sept. 2010	UT	Sex	Enhanced penalties for HIV positive offenders	An HIV-positive sex worker was sentenced to five years imprisonment after pleading guilty to one count of third degree felony solicitation. The woman had tested positive for HIV in 2007 after her fourth prostitution conviction. She had also been imprisoned in 2008 and 2009 for prostitution. [Stephen Hunt, <i>HIV Positive Prostitute Sent to Prison</i> , Salt Lake Tribune, Sept. 17, 2010, http://archive.sltrib.com/article.php?id=11176194&itype=storyID]
July 2010	MD	Spitting	Second Degree Assault	A 44-year-old HIV positive man was sentenced to five years in prison for spitting on a police officer. Because the defendant had no teeth and often spat unintentionally it is not clear whether the man intended to spit on the police officer. [Don Aines, <i>Man with HIV who Spit on Police Officer Sentenced to Five Years</i> , Herald-Mail (Hagerstown, MD), July 26, 2010, http://www.herald-mail.com/?cmd=displaystory&story_id=249796&format=html&autoload=true .]
June 2010	IN	Sex	"Duty to Warn Statute" Class D felony	A 19-year-old woman was charged with failing to disclose her HIV status to her 22-year-old sexual partner. In Sept. 2010 she pleaded guilty and was originally sentenced to 222 days imprisonment but eventually had the prison time negated. As part of her probation, she must complete sex offender counseling, avoid internet use, and not possess any pornography. [<i>No prison for teen's lie about HIV, sex</i> , JOnline.com, Oct. 13, 2010, http://www.wthr.com/global/story.asp?s=12655922]
May 2010	OK	Spitting	Spreading Infectious Disease and Knowingly Engaging to Transfer HIV	A man claiming to be HIV-positive was booked on four felony complaints after moving his head to throw blood at emergency medical workers. He is also alleged to have spit blood at the workers during his rescue and treatment for injuries from a fire. [Shannon Muchmore, <i>Man Who Says He Has HIV Allegedly Spits on Emergency Workers</i> , Tulsa World, May 23, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20100523_298_0_Amanwh547994]
May 2010	AR	Spitting	Aggravated assault and exposing another to HIV.	A 41-year old, HIV+ man was arrested after spitting blood at a police officer. He is currently facing charges of aggravated assault and exposing another to HIV. [Gavin Lesnick, <i>HIV-positive Man Spits Blood at Police Officer, report says</i> , ArkansasOnline.com, May 12, 2010, http://www.arkansasonline.com/news/2010/may/12/hiv-positive-man-spits-blood-officer-report-says/?latest]
May 2010	MI	Biting	Bioterrorism	A HIV+ man was charged with bioterrorism for biting his neighbor during an argument. The man eventually pleaded guilty to an assault charge and was given probation by the judge. [<i>HIV-positive man tied to bioterrorism charge gets probation</i> , Free Press,

				Christina Hall, Dec. 8, 2010, http://www.freep.com/article/20101208/NEWS04/101208026/1320/HIV-positive-man-sentenced-in-biting]
Mar. 2010	TX	Sex	Aggravated Sexual Assault of a child.	A 49-year-old HIV+ man, who was aware of his HIV status, was charged with having unprotected sex with a minor. The charge became “aggravated” because of his HIV status, making it a felony. [Houston Chronicle 3/22/10, http://www.chron.com/news/houston-texas/article/In-1st-for-Harris-Co-HIV-deemed-deadly-weapon-1714831.php]
Mar. 2010	MN	Sex	Assault	A 28-year-old HIV+ man was charged with assault after failing to tell his partners his HIV status prior to having unprotected consensual sex. One partner tested positive for HIV. [Star Tribune 3/24/10]
Mar. 2010	AR	Sex	Knowingly Exposing Another to HIV	A 33-year-old HIV+ man was arrested for having unprotected sex with a woman, knowing he had HIV, and failing to inform her of his illness. Woman has now tested positive for HIV. Pled not guilty; sentenced to 20 years in prison. [Times Record Online 3/11/10, http://www.swtimes.com/news/article_65cead58-2a9f-51f9-b9be-3fd6c779af14.html]
Mar. 2010	MI	Sex	Failing to Disclose HIV Status to Sexual Partner	A 54-year-old HIV+ woman allegedly failed to tell her sexual partner that she had HIV. She was sentenced to 11 months in prison. [The Michigan Messenger 3/11/10] http://michiganmessenger.com/35670/isabella-county-woman-charged-with-failing-to-disclose-her-hiv-positive-status-to-sex-partner
Mar. 2010	MD	Sex	Knowingly Exposing Others to HIV	A 29-year-old HIV+ man was sentenced to 18 months in prison after he knowingly exposed an 18-year-old woman to the HIV virus. [Gazette.net 3/10/10]
Mar. 2010	NJ	Sex	Third Degree Diseased Person Charge (HIV Specific)	A 20-year-old HIV+ man charged with having “high risk sexual behavior” with a female without her informed consent. [LehighValleyLive.com 3/10/10]
Mar. 2010	OH	Sex	Loitering to Engage in Sexual Activity Being HIV Positive and Soliciting with Previous Conviction Being HIV Positive	A 38-year-old HIV+ woman was charged with attempted solicitation. [Chicago Tribune 3/10/10]
Mar. 2010	IN	Donating Plasma	Donating Plasma when Knowing HIV+ Status	A 39-year-old HIV+ woman plead not guilty to donating plasma in 2008, though she had been diagnosed with HIV since 2005. [Chicago Tribune 3/9/09]
Feb. 2010	FL	Sex	Failing to Disclose HIV Status to Sexual Partner	A 45-year-old HIV+ man pleaded not guilty to a first degree felony charge for allegedly failing to tell his sexual partner that he was HIV position. [POZ 2/24/10]
Feb. 2010	IN	Sex	Failure of Carriers Duty to Warn	A 47-year-old HIV+ man had sexual relations with several woman without telling them he was HIV+. He plead guilty to two counts, and was sentenced to 18 months on Dec. 12, 2011. He will be sentenced for another 14 counts in Feb. 2012. [http://www.abc57.com/video/Indiana-man-behind-bars-for-infecting-partners-with-HIV-135545753.html]
Dec. 2009	IA	Sex	Criminal Transmission of HIV (transmission need not occur)	A 38-year-old HIV+ man was charged with a felony after he allegedly failed to tell his sexual partner is HIV status. [wcfcourier.com 12/23/09]

Nov. 2009	MI	Sex	AIDS-sexual penetration with an Uninformed Partner	A 21-year-old HIV+ man had consensual sexual relations; pled guilty and sentenced to 9 months in jail. [Midland Daily News 11/18/2009]
Nov. 2009	SC	Sex	Knowingly Exposing Another to HIV	A man was sentenced for knowingly exposing his wife to HIV; sentenced to 6 years in prison. Wife did not contract HIV. [The Augusta Chronicle 9/14/09]
Nov. 2009	TX	Sex	Aggravated sexual assault with deadly weapon	A 26-year-old man was charged with aggravated sexual assault with deadly weapon (HIV being the deadly weapon) after allegedly having unprotected sex with a 16-year-old. http://www.kxxv.com/Global/story.asp?S=11436836 He pleaded guilty in June 2010, and received a 15 year prison sentence in August 2010. http://www.kxxv.com/global/story.asp?s=12977817
Oct. 2009	SC	Sex	Knowingly Exposing Another to HIV	A 24-year-old HIV positive man exposed another to HIV. [WMFBNews.com 10/27/09]
Oct. 2009	PA	Spitting	Aggravated Assault (HIV and prisoner specific)	A HIV and Hepatitis C positive woman was charged after she spit in the face of another inmate; sentenced to 21 months to 10 years in prison. [citizensvoice.com 10/15/09] [Wyoming County Press Examiner 9/9/09]
Oct. 2009	VA	Sex	Aggravated Assault (HIV Specific). Court Martial (Military)	Two women, including ex-wife, chose to have consensual, unprotected sex with a Military Officer, knowing that he had HIV. The man was sentenced to 3 months in confinement and a bad conduct discharge after pleading guilty to two counts of aggravated assault and disobeying an order. The order was for him to have sex only with the use of protection. Neither woman contracted HIV. [Virginian Pilot 10/7/09]
Sept. 2009	IL	Sex	Criminal Transmission of HIV	A 42-year-old HIV+ man had sex with a 19-year-old woman with allegedly failing to inform the woman that he was HIV+. Unknown if the woman has tested positive for HIV. Criminal statute applies even if the sex partner is not subsequently infected with HIV. [Journal Gazette Times Courier 9/21/09] Pled Guilty; sentenced to 6 years in prison. [Herald Review 2/6/10]
Sept. 2009	ID	Sex	Knowingly Exposing Another to HIV	A 44-year-old HIV+ man pleaded guilty to two felony charges of exposing women to HIV. Sentenced to 30 years in prison with the possibility of parole after 20 years. At least one woman was not infected with HIV. [Idahostatesman.com 9/17/09]
Sept. 2009	OH	Sex	Loitering to Engage in Prostitution with the Knowledge that He/She Has Tested Positive for HIV	A 25-year-old HIV+ man was arrested for prostitution. It was later discovered that the man knew he was HIV positive. [Dayton Daily News 9/11/09]
Sept. 2009	SC	Sex	Knowingly Engaging in Sexual Intercourse without Disclosing HIV Status	A 35-year-old HIV+ man had sexual relations with a woman without telling her that he was HIV positive. [WMBFNews.com 9/11/09].
Sept. 2009	TN	Spitting	Criminal Exposure to HIV	A HIV+ man spit blood at a police officer while being arrested for burglary. [Chicago Tribune 9/4/09] [myeyewitnessnews.com 9/3/09]
Aug. 2009	GA	Biting	Aggravated Assault	A 42-year-old, HIV+ man was sentenced to 18 months for aggravated assault after he bit an Atlanta police officer. He allegedly shouted "I have full-blown AIDS" and bragged that he had infected the officer. The police officer did not test positive for HIV.

				[Stephanie Ramage, <i>Too Lenient?</i> , SundayPaper.com, Aug., 30, 2009, http://www.sundaypaper.com/DesktopModules/DnnForge%20%20NewsArticles/Print.aspx?tabid=98&tabmoduleid=940&articleid=4452&moduleid=922&PortalID=0]
Aug. 2009	FL	Biting	Aggravated battery on a law enforcement officer (not HIV-specific) [Originally charged with attempted murder]	35-year-old HIV+ man bit a police officer and drew blood while trying to avoid being arrested; officer tested negative; sentenced to 15 years. [Miami Herald 8/26/09]
Aug. 2009	FL	Sex	Committing Prostitution while HIV Positive (3 rd Degree Felony with possibility of maximum of 5 years in prison)	A 32-year-old woman was arrested for working as a prostitute while she knew she was HIV positive. [Palm Beach Post 8/21/09]
Aug. 2009	FL	Sex	Failing to Inform a Sexual Partner of One's Known HIV Status	A 39-year-old HIV+ woman was arrested for having unprotected sex with a man without disclosing her HIV status. [Ocala.com 8/14/09]
Aug. 2009	MN	Sex	Knowing transfer of communicable disease	39-year-old HIV+ man had sex with girlfriend w/o disclosing his HIV status; girlfriend tested negative; ex-wife tested positive [Duluth News Tribune 8/11/09]; pled guilty; sentenced to 90 days in jail. [POZ Magazine 10/29/09]
July 2009	AR	Sex	Knowing exposure to HIV	A 29- year-old man was arrested for raping a child and knowingly exposing the child to HIV. http://www.fox16.com/news/local/story/Man-charged-with-knowingly-exposing-child-to-HIV/Bn1fSMFQ5UCN9yFeHO1H0Q.csp
July 2009	SC	Biting	Assault and Intent to Kill	A 41-year-old HIV-positive man was charged with assault and intent to kill after biting his neighbor. An original charge of simple assault was upgraded after it was discovered that the assailant was HIV-positive. This case is pending. [Greg Suskin, <i>Charges Upgraded Against HIV Positive Man After Fight</i> , wsoctv.com, July 29, 2009, http://www.wsoctv.com/news/20147162/detail.html]
July 2009	WA	Sex	Assault (HIV-specific)	An HIV+ man had unprotected sex with other men w/o disclosing his HIV status; pending. [The Spokesman-Review 7/15/09]
July 2009	OR	Sex	Assault and attempted assault (not HIV-specific)	21-year-old HIV+ man had unprotected sex with woman w/o disclosing his HIV status; pled guilty; woman tested positive for HIV; sentenced to 2 yrs in prison, 3 yrs post-prison supervision, sex offender evaluation [The Oregonian 7/17/09]
July 2009	VT	Spitting	Aggravated assault against a police officer	31-year-old HIV+ man spat on police officer while being restrained for treatment after police responded to possible drug overdose; pending [Times Argus 7/30/09]
June 2009	KS	Sex	Exposing another to a life-threatening communicable disease	Kansas Supreme Court reversed convictions for exposing another to a life-threatening communicable disease, finding that the prosecution failed to prove that defendant intended to expose the complainants to HIV. [State v. Richardson, 209 P.3d 696 (Kan. 2009)]
June 2009	NC	Biting	Assault inflicting serious bodily injury & assault with a deadly weapon	A 45-year-old HIV+ man cut a police officer's thumb and bit the police officer's ear during an altercation; pending [Man Used His HIV as weapon, police say, News and Observer, June 21, 2009, http://www.newsobserver.com/2009/06/22/81920/man-used-his-hiv-as-weapon-police.html#storylink=misearch]

June 2009	NY	Spitting	Aggravated assault on a police officer by means of a deadly weapon (saliva)	HIV+ man allegedly spat on police officer while being subdued for erratic behavior after learning HIV diagnosis; took 10-year plea deal & reserved right to appeal; appeal pending [Information from defendant and defense counsel]
June 2009	OH	Spitting	Harassment by inmate (HIV-specific; not limited to inmates)	HIV+ man spat on police officer and EMT while being subdued for erratic behavior after suicide attempt; attorney challenged validity of statute; pled no contest; sentenced to 60 days house arrest in Sept. 2009 [Information from defense counsel]
May 2009	AR	Sex	Knowingly transmitting AIDS, HIV	HIV+ teenage boy had sex with teenage girl w/o disclosing his HIV status; being tried as an adult; pending [4029tv.com 5/19/09]
May 2009	OH	Sex	Felonious assault (HIV-specific)	HIV+ man had sex with woman without disclosing his HIV status; appeal pending; attorney challenged constitutionality of statute [Information from defense counsel]
May 2009	TX	Sex	Aggravated assault (not HIV-specific). Assault with a deadly weapon.	53-year-old HIV+ man had sex with multiple women w/o disclosing HIV status; at least 6 women tested positive for HIV [Dallas Morning News 5/28/09]; sentenced to 5 45-yr and 1 25-yr prison terms [Dallas Morning News 5/30/09] http://abcnews.go.com/2020/story?id=7696939&page=1
May 2009	FL	Sex	Unlawful acts (HIV-specific)	HIV+ woman had sex with multiple men w/o disclosing her HIV status; pending [Orlando Sentinel 5/8/09]
May 2009	IA	Sex	Criminal transmission of HIV (transmission need not occur)	HIV+ man had sex one time with man he met online; was under influence of drugs during sex; not clear if condom was used; other man not HIV+ after testing; received 25-year sentence & must register as sex offender [wcfcourier.com 5/2/09]; later released on 5 yrs probation after reconsideration hearing on Sept. 11, 2009 [accesslineiowa.com 9/14/09]; the HIV+ man is now listed as a sex offender.
April 2009	MI	Sex	Sexual penetration w/ knowledge of AIDS or HIV infection	An HIV+ woman employed at a sex club had sex w/ multiple partners w/o disclosing her HIV status; [Michigan Live 4/29/09]; sentenced to 16 mos. to 20 yrs [Niles Daily Star 9/22/09]
Jan. 2009	GA	Sex	Reckless conduct by HIV infected persons	38-year-old HIV+ man had sex with a woman w/o disclosing his HIV status; woman agreed to unprotected sex with man who lived in housing program for people with HIV; woman tested negative; pled guilty; sentenced to 2 yrs in prison and 8 yrs probation [macon.com 1/13/09]
Dec. 2008	MI	Sex	Failing to Disclose HIV Status to Sexual Partners	A 38-year-old HIV+ woman pled guilty to failing to inform her sexual partners of her HIV status. She was sentenced to time already served, 68 days. [mlive.com 12/10/08]
Dec. 2008	CO	Sex	Child abuse resulting in serious injury (not HIV-specific)	33-year-old HIV+ man had sex with pregnant fiancée w/o disclosing his HIV status; both mother and baby tested positive for HIV [GJSentinel.com 12/23/08]; sentenced to 15 yrs in July 2009 [GJSentinel.com 7/18/09]
Dec. 2008	NE	Sex	Manufacturing child pornography (not HIV-specific)	48-year-old HIV+ man had consensual sex with 17-year-old boy w/o disclosing his HIV status; videotaped sexual encounter; boy tested positive for HIV; sentenced to 20 years (cut to 10 per state sentencing guidelines) [Omaha World Herald 12/22/08]
Oct. 2008	OK	Biting	Knowingly Engaging to Transfer HIV	A 50-year old, HIV-positive woman was arrested in October 2008 after biting a security guard and attempting to spread the virus. The outcome of this case is unknown. [Jay Marks, <i>HIV-positive Woman Faces Felony for Bite</i> , NewsOk, Oct. 8, 2008, http://newsok.com/hiv-positive-woman-faces-felony-for-

				bite/article/3308838]
Oct. 2008	MS	Sex	Endangerment by bodily substance (HIV-specific)	HIV+ African-American woman had sex with white husband over many years w/o disclosing her HIV status; husband alerted police when woman tried to get custody of son in divorce proceeding; husband and son both tested negative; pled guilty; 10-year sentence w/ 9 suspended; one year house arrest [Clarion Ledger 5/16/08, 10/7/08]
Oct. 2008	KY	Sex	Rape; Sodomy	The Kentucky Supreme Court held that a defendant's HIV status may be considered during the sentencing portion of a trial. [Torrence v. Commonwealth, 269 S.W.3d 842 (Ky. 2008)]
Sept. 2008	GA	Sex	Reckless Conduct	A woman was sentenced to 8 years imprisonment for failing to disclose her HIV status to her sexual partners. She argued that her sexual partner must have known of her HIV status because it had been published on the front page of the local newspaper. [Ginn v. State, 667 S.E.2d 712 (Ga. Ct. App. 2008)]
Sept. 2008	MI	Sex	Sexual penetration w/ knowledge of AIDS or HIV infection	A 32-year-old HIV+ man had sex with two women w/o first disclosing his HIV status; HIV status of women unknown. [mlive.com 9/5/08] He was sentenced to 2 months in jail. [mlive.com 2/3/09]
Aug. 2008	NC	Sex	Charges Related to Controlling the Spread of HIV	A 23-year-old, HIV+ man was sentenced to 30 months of probation for having unprotected sex with numerous partners. He was later sentenced to six months of house arrest for further acts of unprotected sex. [Gay DJ put on house arrest for second HIV violation, Wral.com, Oct. 21, 2008, http://www.wral.com/news/news_briefs/story/3781930/]
Aug. 2008	FL	Biting	Criminal Transmission of HIV	A 25-year-old woman was sentenced to 5 years in prison for battery on a law enforcement officer, and resisting arrest with violence, with increased penalties because a Florida law makes it a third degree felony for HIV positive defendants to transfer body fluids during a violent act. She reacted violently while being arrested. She was diagnosed with cancer four months into her sentence, and after a prolonged public campaign was released in January 2011 to die at home. [http://www.miamiherald.com/2011/01/06/2002703/dying-broward-inmate-granted-conditional.html]
Aug. 2008	NH	Spitting	Simple assault	24-year-old man of unknown HIV status spat in police officer's face; sentenced to 2-5 yrs in prison; required to pay for officer's HIV test and apologize to officer [The Citizen of Laconia 8/11/08]
July 2008	GA	Spitting	Aggravated assault (not HIV-specific)	43-year-old HIV+ woman spat in face of other person; allegedly yelled, "I hope you get AIDS"; sentenced to 3 yrs [Ledger-Enquirer 7/22/08]
June 2008	MD	Biting	Knowingly transfer or attempt to transfer HIV	44-year-old HIV+ man bit police officer while being arrested on warrant; officer tested negative for HIV; sentenced to 18 years [gazette.net 6/4/08]
June 2008	ID	Sex	Transferring body fluids containing HIV	An HIV+ man was convicted of transferring body fluids containing HIV after he performed oral sex on complainant. The court refused to take into consideration evidence of the scientific unlikelihood of HIV transmission through male-to-female oral sex. [State v. Mubita, 188 P.3d 867 (Idaho 2008)]
May 2008	TX	Spitting	Harassing a public servant (not HIV-specific) with deadly weapon (saliva)	42-year-old HIV+ homeless man spat on police officer during arrest for public intoxication; sentenced to 35 years (25-year minimum under habitual offender law); must serve at least half because of

				deadly weapon finding; waived right to appeal [NY Times 5/16/08, information from defense counsel]; Unpublished decision on appeal of deadly weapon finding (denied), 2009 WL 2025344 (Tex. App. 2009)
May 2008	TX	Biting	Aggravated robbery (not HIV-specific)	26-year-old HIV+ man bit security guard after being stopped for shoplifting; outcome unknown [nbc5i.com 5/31/08]
May 2008	AR	Sex	Knowingly transmitting AIDS (text of statute refers to exposure)	33-year-old HIV+ man had sex with girlfriend and another woman w/o disclosing his HIV status; both women tested negative for HIV; sentenced to 12 years and must register as sex offender [The Morning News 5/1/08]
April 2008	KY	Biting	Wanton endangerment (not HIV-specific)	HIV+ woman bit store clerk while robbing store; clerk tested negative for HIV; sentenced to 12 years total, 2 of which was for wanton endangerment [<i>HIV-Positive Robber Receives 12 year prison sentence</i> , wkytv.com, April 8, 2008, available at http://www.wkyt.com/home/headlines/17382524.html]
Mar. 2008	SC	Sex	Exposing others to HIV	39-year-old HIV+ man had sex with girlfriend w/o disclosing his HIV status; girlfriend tested positive for HIV during prenatal visit; pled guilty; sentenced to 4 years [goupstate.com 3/21/08]
Feb. 2008	MO	Sex	Prohibited acts (HIV-specific)	43-year-old HIV+ man had sex with a woman w/o disclosing his HIV status; outcome unknown [kspr.com 2/12/08]
Jan. 2008	KS	Sex	Exposing another to a life threatening communicable disease (not HIV-specific)	HIV+ man had sex with two women w/o disclosing his HIV status; defendant thought he posed no risk b/c infection was “under control” w/ meds; both women tested negative for HIV; sentenced to 32 months for each of two counts [Emporia Gazette 1/17/08]; <i>conviction reversed by Kansas Supreme Court on 6/19/09 on specific intent issue, State v. Richardson, 209 P.3d 696 (Kan. 2009)</i>

HIV CRIMINALIZATION FACT SHEET

MOST STATES HAVE TARGETED HIV-POSITIVE INDIVIDUALS FOR CRIMINAL LIABILITY BASED ON THEIR HIV STATUS

- Thirty-four (36) states and two (2) U.S. territories explicitly criminalize HIV exposure through sex, shared needles or, in some states, exposure to “bodily fluids” that can include saliva. At least thirty-five (35) states have singled out people who have tested positive for HIV for criminal prosecution or enhanced sentences, either under HIV-specific criminal laws or under general criminal laws governing crimes such as assault, attempted murder or reckless endangerment.
- Proof of intent to transmit HIV, or actual transmission, typically are not elements of these prosecutions.
- Spitting and biting, which pose no significant risk of HIV transmission, have resulted in criminal convictions and severe sentences despite the absence of HIV transmission in these cases.
- Disclosure is often the only affirmative defense to prosecution, but typically is difficult to prove. Condom use is rarely a defense.
- The common factor in all of these cases is that the criminal defendant knew her/his HIV status.
- Also common to these cases is severe ignorance of the routes and actual risk of HIV transmission in varying circumstances, and grossly exaggerated characterizations of the risk of harm defendants pose.

CRIMINALIZATION HAS NO EFFECT ON BEHAVIOR & UNDERMINES PUBLIC HEALTH GOALS

- Studies show that the criminalization of HIV exposure has no effect on risk behavior.
- HIV criminalization can discourage individuals from seeking testing and treatment because a positive test result subjects a person to criminal liability for otherwise non-criminal conduct.
- Health care providers frequently are forced to disclose HIV-related medical records, including documentation of private communications, as part of a criminal investigation or trial, interfering with the physician-patient relationship and delivery of health services and generating mistrust among patients.
- In some states, health officials actually participate in creation of evidence that can be used against individuals with HIV, by requiring them to sign forms acknowledging criminal liability if they engage in certain otherwise-legal conduct.
- Sex between two consenting adults is a shared decision; the responsibility for protection against disease should not be borne by one partner. Placing exclusive responsibility on the person living with HIV undermines public health messages that everyone should take responsibility for individual sexual health.
- Criminalization further stigmatizes an already marginalized population, and reinforces ignorance and unfounded beliefs about the routes and actual risks of HIV transmission.

HIV PROSECUTIONS DISCRIMINATE AGAINST HIV-POSITIVE PERSONS

- Charges for HIV exposure often are accompanied by sensationalist media coverage, which often includes disclosure of the HIV-positive person’s identity, disclosing the person’s HIV status not only to the individual’s community but also, with the internet, to the world.
- Sentences for people convicted of HIV exposure are typically very harsh and grossly disproportionate to any actual or potential harm, perpetuating the misconception that people with HIV are toxic, highly infectious and dangerous.
- HIV-positive persons increasingly are forced to register as sex offenders after conviction, leading to a host of life-long problems with future employment, living conditions, and the right to privacy.
- HIV exposure laws are applied unfairly and selectively, targeting those who are socially and economically marginalized, such as sex workers, while those with other STIs or infectious diseases are not targeted.